Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

JILL GAVLE

Petitioner,

v.

LITTLE SIX, INC., A FOREIGN CORPORATION
d/b/a MYSTIC LAKE CASINO, et al.

Respondent.

On Petition For Writ Of Certiorari To The Minnesota Supreme Court

PETITION FOR WRIT OF CERTIORARI AND APPENDICES

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QUESTIONS PRESENTED FOR REVIEW

A. Whether the defense of tribal sovereign immunity applies to a Native American owned corporation, which is separate and distinct from the tribe, when it conducts business off the reservation?

B. Whether a Native American owned corporation waives the tribal sovereign immunity defense, when the corporation appoints an agent for service of process and irrevocably consents to be sued in Minnesota courts for purposes of voluntarily obtaining a certificate of authority to transact business in the State of Minnesota?

LIST OF PARTIES

Petitioner, Jill A. Gavle is an individual and a United States citizen living in the State of Minnesota (hereinafter "Gavle"). Respondent Little Six, Inc. (hereinafter "Little Six") is a for profit business corporation engaged in gaming and other enterprises on and off the Shakopee Mdewakanton Sioux Indian Community Reservation in the State of Minnesota. Three individually named defendants, Leonard Prescott, Allene Ross and William Johnson are not parties to the appeal or the decision of the Minnesota Supreme Court below.

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OPINIONS BELOW

The opinion of the Minnesota Supreme Court is reported at 555 N.W.2d 284 (Minn. 1996) and reprinted at Appendix A. The opinion of the Minnesota Court of Appeals is reported at 534 N.W.2d 280 (Minn. App.1985) and reprinted at Appendix B. The order and decision of Scott County District Court in the State of Minnesota (Howe, J.), granting summary judgment for Respondent, is unreported and is reprinted at Appendix C.

JURISDICTIONAL BASIS

The judgment of the Minnesota Supreme Court was filed on October 31, 1996. This Court has jurisdiction under 28 U.S.C. § 1257(a). The petition herein was timely filed pursuant to 28 U.S.C. § 2101(c).

STATUTES INVOLVED

U.S CONST. art. VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. XIV, § 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1605, in pertinent part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-
>
> > (1) in which the foreign state has waived its immunity either explicitly or by implication. . . . ;
> >
> > (2) in which the action is based upon commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with the commercial activity of the foreign state elsewhere. . . .

28 U.S.C. § 1360 (Public Law 280) reads in pertinent part:

> (a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State: . . . Minnesota. . . . All Indian country within the State, except the Red Lake Indian Reservation.

MINN. CONST. art I, § 4

> The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy.

MINN. CONST. art. I, § 8:

> Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

Minn. Stat § 303.06, Subd. 1 (1994):

> Application for certificate of authority.
>
> Subdivision 1. Contents. In order to procure a certificate of authority to transact business in this state, a foreign corporation shall make application therefore to the secretary of state, which application shall set forth:
>
> (1) The name of the corporation and the state or country under the laws of which it is organized; . . .
>
> (5) The address of its proposed registered office in this state and the name of its proposed registered agent in this state;
>
> (6) That it irrevocably consents to service of process upon it as set forth in section 303.13, or any amendment thereto; . . .

Minn. Stat. § 303.02, Subd. 6 (1994):

> Process. "Process" means any statutory notice or demand required or permitted to be served on a natural person or a corporation, and includes the summons in a civil action, and any process which may be issued in any action or proceeding in any court.

Minn. Stat. § 303.09 (1994):

> Powers same as domestic corporation. After the issuance of a certificate of authority by the secretary of state and until cancellation or revocation thereof or issuance of a certificate of withdrawal, the corporation shall possess within this state the same rights and privileges that a domestic corporation would possess if organized for the purposes set forth in the articles of incorporation of such foreign corporation pursuant to which its certificate of authority is issued, and shall be subject to the laws of this state.

Minn. Stat § 303.23, Subd. 1 (1994):

> Certificate Issued By Secretary of State.
>
> Subd. 1 Prima facie evidence; recording. Any certificate issued by the Secretary of State pursuant to the provisions of this chapter; and copies of the certificates certified by him, shall be prima facia evidence of the matters stated therein.

STATEMENT OF THE CASE

Petitioner Jill Gavle is a female citizen of Minnesota who worked for Respondent Little Six, Inc. ("Little Six"), a for-profit business corporation formed under the laws of the Shakopee Mdewakanton Sioux Community, a federally recognized Indian tribe. Respondent managed Mystic Lake Casino in Prior Lake, Minnesota and operated other businesses in Minnesota and North Dakota. During 1991, Respondent voluntarily registered in Minnesota as a foreign corporation under Minn. Stat. § 303.01 et seq. (the Minnesota Foreign Corporations Act) and obtained a certificate of authority to transact business in Minnesota. The written application process under the Minnesota statute contained language whereby the Respondent "irrevocably" consented to service of process and agreed to be bound by the laws of the State of Minnesota.

As an employee, Petitioner Gavle worked as a security guard for Respondent both on and off of the trust lands and reservation upon which the Mystic Lake Casino complex was located. In particular, Petitioner frequently worked at Respondent's corporate headquarters located off the reservation. (App. 70-71). Many of the underlying facts also occurred off of the reservation. Petitioner's Complaint in State court alleged that she was subjected to assault, sexual harassment, racial discrimination, pregnancy discrimination and other actionable conduct by three corporate directors and officers of Respondent. When Petitioner became pregnant by defendant Prescott (i.e., Little Six's Chairman and top executive), she was threatened, harassed and her employment was terminated due to her pregnancy. She was also threatened and forced to leave the State of Minnesota so that her pregnancy would

remain a secret. Petitioner fled to the State of Arizona early in her pregnancy and eventually gave birth to a daughter while in Arizona.

On October 10, 1994, Petitioner commenced this action in Scott County District Court in the State of Minnesota, asserting employment related claims under state and federal law. Respondent brought a motion to dismiss Gavle's Complaint based upon the defense of tribal sovereign immunity, claiming that Little Six, Inc. was part of a federally recognized Indian tribe, that as a matter of federal law, was immune from Petitioner's claims. The District Court granted Little Six's motion for summary judgment and dismissed Petitioner's complaint. (App. 56).

On Petitioner's appeal, the Minnesota Court of Appeals affirmed, holding that the State court had jurisdiction over Respondent, but found no waiver of the tribal sovereign immunity defense. (App. 40). The Minnesota Supreme Court granted review.

On October 31, 1996, the Minnesota Supreme Court affirmed the dismissal of Petitioner's action against Respondent, finding again that the State court had jurisdiction in the action, but that Respondent's claims were barred by *tribal* sovereign immunity. (App. 1). There were two strong dissenting opinions accompanying the decision of the Minnesota Supreme Court. (App. 31-38).

I. REASONS FOR GRANTING THE WRIT

A. The Opinion Of The Minnesota Supreme Court Is Inconsistent With This Court's Previous Opinions Interpreting The Application Of Tribal Sovereign Immunity To Tribal Businesses Operating Off The Reservation.

1. Assertion of Tribal Sovereign Immunity.

The opinion below is inconsistent with this Court's decision in *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973), in which the Court considered the question as to whether a ski resort owned and operated by an Indian tribe,

but which was located outside the boundaries of the reservation, would be subject to New Mexico's gross receipt's tax. The Court held that:

> The upshot has been repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted by federal law. . . . But tribal activities conducted outside reservation boundaries present different considerations. 'State authority over Indians is yet more extensive over activities . . . not on any reservation.' *Organized Village of Kake*, supra, 369 U.S., at 75, 82 S.Ct., at 571. Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.

Mescalero, 411 U.S. at 148-149. Petitioner in the instant case has merely sought to enforce contract, tort and human rights laws that are applicable to all persons and corporations in the State of Minnesota. Respondent, Little Six claims in substance, that the federal law doctrine of tribal sovereign immunity allows it to: (i) conduct commerce in the State of Minnesota in corporate form; (ii) injure its employees and other United States citizens in the course of its business dealings, and (iii) then avoid legal responsibility for its actions on the grounds of tribal sovereign immunity.

In *Organized Village of Kake*, 369 U.S. 60, 82 S.Ct. 562 (1962), this Court also stated that: " . . . Congress has to a substantial degree opened the doors of reservations to state laws. . . . ". It is difficult to reconcile the decisions of the lower courts herein, which have failed to enforce state laws against the egregious acts of a corporate entity committed both on and off the reservation. This is particularly true given the fact that Indian tribes are "domestic dependant nations". *Cherokee Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1 (1831) not superior sovereigns.

In *Oklahoma Tax Commission v. Chickasaw Nation*, ___U.S. ___, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) this Court

determined that the rule that Indians and Indian tribes are generally immune from state taxation, does not operate *outside* "Indian country". While *Chickasaw Nation* is a state taxation case, in *Bryan v. Itasca County*, 426 U.S. 373, 383, 96 S.Ct. 2102, 2108 (1976), the Court, (commenting on Public Law 280, 28 U.S.C. § 1360[1]) indicated that civil contract and tort laws, (like those Petitioner is relying upon for protection herein) are even less intrusive to tribal interests than state taxation laws. Therefore, it follows, that tribal sovereign immunity should not operate outside the reservation to deprive Petitioner of her constitutional day in court, due process, as well as the equal protection of non-discriminatory civil laws provided by U.S. CONST. art. VII and U.S. CONST. amend. XIV, § 1.

In the instant case, the Minnesota Supreme Court has contradicted the teachings of *Mescalero* and has misapplied the non-discriminatory state corporate statutes, in a manner which creates super-sovereign business corporations. In realizing this unconscionable and unconstitutional result, the Minnesota Supreme Court itself stated in its opinion:

> While the time may well come, or even be upon us now, that a tribal owned corporation, operated for profit as is LSI, should as a matter of fairness and equity be subject to the same liabilities as a non-tribally owned corporation, it is not for this court to make that decision in the absence of some change in Congressional policy or *direction from the U.S. Supreme Court* indicating that under such circumstances elimination of the tribal corporation's sovereign immunity is appropriate. (emphasis added).

Gavle v. Little Six, Inc., 555 N.W.2d 284, 296 (Minn. 1996). (App. 26). Based upon the foregoing, Petitioner now asks this

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[1] Public Law 280 provides civil jurisdiction to Minnesota courts, even on reservation lands. The issue still remains confused at best, as to whether Public Law 280 would provide a waiver of immunity as it relates to a for-profit business corporation, separate and distinct from the tribal government.

Court to provide the necessary direction to the lower courts to avoid the blatant unfairness, inequity and inconsistencies created by the decisions below. In *Puyallup Tribe, Inc. v. State of Washington*, 433 U.S.165, 97 S.Ct. 2616, 53 L.Ed.2d. 667 (1977) Justice Blackmun concurring stated:

> I entertain doubts, however, about continuing vitality in this day of the doctrine of tribal immunity as it was enunciated in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940). I am of the view that doctrine may well merit re-examination in an appropriate case.

Puyallup Tribe, Inc., 433 U.S. at 178-79, 97 S.Ct. at 2624. (Blackmun, J., concurring). Petitioner's case is precisely the type of case demanding re-examination of the application of tribal sovereign immunity that Justice Blackmun must have been referring to in *Puyallup Tribe*. Justice Stevens more recently stated: "The doctrine of sovereign immunity is founded upon an anachronistic fiction. See *Nevada v. Hall*, 440 U.S. 410, 414-416 (1979). In my opinion all Governments – federal, state, *and tribal* – should generally be held accountable for their illegal conduct."(emphasis added). *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 514, 111 S.Ct. 905, 912 (1991) (Stevens, J. concurring). The lower court's decision carries this "anachronistic fiction" to a ridiculous extreme.

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." *Cohen v. Little Six, Inc.*, 543 N.W.2d 376, 408 FN2 (Minn. App. 1995) (Randall, J. dissenting), citing, Oliver Wendell Holmes, *Path of the Law*, 10 Harv. L.R. 457, 469 (1897). The most important and critical consideration here is that if Respondent is not the *tribe* or arm of the tribal government (as determined by the Minnesota

Court of Appeals[2]), then arguments pertaining to the defense of *tribal* sovereign immunity are simply irrelevant. Chief Justice Keith of the Minnesota Supreme Court in his dissenting opinion below correctly noted:

> However, this does not change the fact that LSI is a private corporation, registered to transact business in the State of Minnesota like any other private business, and certainly not an extension of the tribal government per se. Furthermore, LSI was not incorporated under Section 17 of the Indian Reorganization Act, which extends sovereign immunity to corporations formed by tribal governments to further the tribe's economic interests. See 25 U.S.C. ¶¶ 476, 477 (1994). . . . As the Court of Appeals found, LSI "was created as a separate economic entity, not subject to governmental control, incorporated under tribal law and not merely as an authorized tribal activity." *Gavle v. Little Six, Inc.*, 534 N.W.2d 280, 284 (Minn. App. 1995).

Gavle v. Little Six, Inc., 555 N.W.2d 284, 299 (Minn. 1996) (Keith, C.J, Dissenting) (App. 33-34). Based upon the foregoing, the lower courts have clearly departed from the teachings of this Court in cases ranging from *Cherokee Nation* to *Mescalero*.

2. The Foreign Sovereigns Act of 1976.

Within the question as to whether tribal sovereign immunity can be applied to off-reservation business activity, an issue is presented which has never been determined by this Court. It is an important issue which is growing on a daily basis due to the success, rapid expansion and diversification of tribal related businesses both on and off reservations. The Foreign Sovereigns Act of 1976 implemented a restrictive view of sovereign immunity for foreign sovereigns. The relevant provisions of 28 U.S.C. § 1605 (a) read as follows:

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[2] *Gavle v. Little Six, Inc.*, 534 N.W.2d 280, 284 (Minn. App. 1995). (App. 47-48)

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . .
>
> > (2) in which the action is based upon commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with the commercial activity of the foreign state elsewhere. . . .

The definition of "foreign state" found in 28 U.S.C. § 1603 (b), includes an agency or instrumentality of a foreign state, which includes any entity which is a separate legal person, *corporate* or otherwise. . . . " (emphasis added.) There is no specific exception for sovereign Indian tribes or corporations owned by Indians under the Act. Native American tribes have a common-law immunity from suit similar to that accorded sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). However, Indian tribes are dependant and subservient sovereigns, existing only at the sufferance of Congress and are subject to complete defeasance. *States v. Wheeler*, 435 U.S. 313, 323 (1978). In this setting, the application of the Foreign Sovereigns Act of 1976 to off-reservation (or on reservation) business activity is unresolved.

Petitioner argued below, that the Foreign Sovereign Immunities Act of 1976, as an act of Congress, invalidated sovereign immunity for *all* business operations conducting business in the United States. In the face of the Foreign Sovereign Immunities Act of 1976, how is it that any tribe or tribal corporation can enjoy total super-sovereign powers for their off-reservation business activities in the United States, when true international sovereigns having more true sovereignty, have no such defense. The Minnesota Supreme court failed to address this issue. It is clearly contrary to the intent of Congress to allow immunity for business operations in the United States, whether they originate from Sweden, South Korea or a Sioux tribe.

Furthermore, given the fact that actions are allowed against foreign nations, the federal government, state governments and local governments; the decision below leads to an unconscionable and unintended result. If the lower court's decision is allowed to stand, Respondent corporation, and those businesses similarly situated, are exalted to the position of being the only business entities in the entire world that can totally avoid legal responsibility and liability for their business activities in the United States. There is simply no legal or equitable authority which allows such a ridiculous and unintended result. This was precisely the concern raised by Justice Stevens, concurring in *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991), when he remarked that he was "not sure that the rule of tribal sovereign immunity extends to cases arising from the tribe's conduct of commercial activities off the reservation." 498 U.S. at 514, 11 S.Ct. at 912 (citing the Foreign Sovereign Immunities Act).

In the case of *In Re Greene*, 980 F.2d 590 (9th Cir. 1992), the Ninth Circuit Court of Appeals mentioned the Foreign Sovereign Immunities Act in passing, but never directly discussed whether the statute actually applied to tribes or corporations owned by tribes conducting business in the United States. *Id.* at 594. The court in *In Re Greene* commented that Congressional silence on the issue was instructive. However, despite the view expressed in *In Re Greene*, Congress knows how to except out Native American tribes from statutory provisions when it wants to do so. See, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994). (Indian *tribes* expressly excluded from definition of "employer".)[3] Based

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[3] The constitutionality of applying civil rights legislation on a piecemeal basis is subject to attack. Particularly, when the same legislation presumably applies to and protects all citizens of the United States, regardless of race. If the statute is truly designed to promote color-blindness, then why do we build in an exception that only sees the color red. See *Cohen v. Little Six*, 543 N.W.2d 376, 395 (Minn. App. 1995) (Randall, J. dissenting). Would we openly allow exceptions to Title VII for "caucasian", "black" or "asian" employers? Or conversely, would we

upon the foregoing, the Foreign Sovereign Immunities Act clearly is applicable to tribal related corporations which conduct business in the United States, whether on or off the reservation. The issue here appears ripe for determination by this Court.

3. The Interests of State of Minnesota:

This Court has often utilized balancing tests to analyze cases involving Native American issues. In the instant case, the State of Minnesota has a valid and overriding interest in protecting its citizens from the conduct of unscrupulous foreign corporations operating in the State. The State of Minnesota also constitutionally guarantees the right to have a jury trial in a Minnesota state court. See MINN. CONST. art I, § 4 (stating "[t]he right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy"). The Minnesota Constitution also provides that:

> Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive to his person, property or character, and to obtain justice freely and without purchase, completely and without denial, promptly and without delay, conformable to the laws.

MINN. CONST. art I, § 8. In the instant case, Petitioner Gavle seeks to enforce basic human rights protected under the U.S. Constitution, Minnesota Constitution, state human rights provisions, common law tort theories, contract law, employment law and other laws (including federal and state statutes) designed specifically to protect the safety and well-being of

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openly legislate that Indians or Indian tribes have no protection under Title VII? Furthermore, the argument that Indian tribes are political entities and not racial groups is contrary to fact. In order to be recognized as a member of any particular tribe, you must establish proper ancestry and blood quantum. This is clearly not equal protection, and is indicative of the ridiculous extremes to which tribal sovereign immunity has been stretched.

female employees and other minorities in the State of Minnesota. A non-tribal business corporation, operating off of the reservation, should have no sovereign immunity to assert, and we urge this Court to rule accordingly.

Under the two-stage balancing test of *Rice v. Rehner*, 463 U.S. 713, 720, 103 S.Ct. 3291, 3296, 77 L.Ed.2d 961 (1983), the State of Minnesota has a much stronger interest in insuring the protection of basic human rights for all citizens and in prohibiting law abiding business practices within the state. Clearly, Respondent can not argue that enforcing human rights statutes that promote racial equality would be inconsistent with their traditions or beliefs.

Justice Coyne of the Minnesota Supreme Court also strongly dissenting in the decision below, put it quite succinctly when she stated that:

> Gavle complains of violation of the Minnesota Human Rights Act, Minn. Stat. ch. 363 (1994). The requirements of the Minnesota Human Rights Act are applicable to the state and its political subdivisions as well as private employers, and I can see *no earthly reason* for permitting a foreign corporation to depart the Shakopee Mdewakanton Sioux (Dakota) reservation and to violate with impunity the human rights of Minnesota citizens while transacting business in Minnesota. (emphasis added).

Gavle v. Little Six, Inc., 555 N.W.2d 284, 300 (Minn. 1996) (Coyne, J, dissenting) (App. 36-37). The lower courts have impermissibly converted the limited subservient sovereignty established for Indian *tribes*, on their own lands, into super-sovereignty for multi-million dollar casino *conglomerates*, providing the same with total immunity, whenever and wherever they enter the mainstream of commerce. This result is directly contrary to *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995) wherein this court said "[w]e do not read the [language] as conferring super-sovereign authority to interfere with another jurisdiction's sovereign rights." *Oklahoma Tax Commission v. Chickasaw Nation*, 115 S.Ct.at 2224. The overriding interests of the

State of Minnesota in protecting its citizens should be controlling in the instant case.

The decision of the lower court must be reversed to insure conformity with this Court's prior decisions.

B. The Courts of Appeals and State Courts Are Irreconcilably Split On Whether The Sovereign Immunity Defense Applies to Off-Reservation Business Activities.

The results of the opinion below are even more unconscionable given the undisputed fact that Little Six, Inc. voluntarily and of its own desire, agreed to be bound by the laws of the State of Minnesota and "irrevocably" consented to be sued in Minnesota courts. The Respondent executed written documents for purposes of obtaining a license to conduct business in Minnesota pursuant to the Minnesota Foreign Corporations Act Minn. Stat. § 303.01 et seq. (see App. 63-64).

One of the best discussions of the clearly unsettled nature of this issue, is found in the concurring opinion of Justice Rymer in *In Re Greene*, 980 F.2d 590 (9th Cir. 1992) in which he said:

> . . . state supreme courts have addressed the commercial exception, but with ambiguous results. See e.g., *Dixon v. Picopa Constr. Co.*, 160 Ariz. 251, 772 P.2d 1104, 1109 (1989) (tribal sovereign immunity covers "tribal business" but not "non-tribal business," without definition); *Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845, 850 (1988) (tribal sovereign immunity does not cover economic activities by the tribe off the reservation), cert. denied, 490 U.S. 1029, 1030, 109 S.Ct. 1767, 1768, 104 L.Ed.2d 202 (1989). See also *Duluth Lumber and Plywood Co. v. Delta Development, Inc.*, 281 N.W.2d 377, 382 (Minn. 1979) ("Generally, state courts may assume jurisdiction over disputes arising from commercial transactions between Indians and non-Indians if the transaction is not confined to the Indian Reservation."); *Atkinson v. Haldane*, 569

> P.2d 151, 169-70 (Alaska 1977) (courts do not recognize "proprietary act/governmental function" test regarding tribal sovereign immunity); *North Sea Products, Ltd. v. Clipper Seafoods Co.*, 92 Wash.2d 236, 595 P.2d 938, 939, 942-43 (no commercial exception under existing law, but concurring justice suggests this rule is "unjust, unwise and unreasonable") (1979).
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> Although the United States Supreme Court has held that "without Congressional authorization the Indian nations are exempt from suit," *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940); see *Santa Clara Pueblo v. Martinez*, 436 U.S. at 58, 98 S.Ct. at 1677 (quoting *United States Fidelity & Guaranty*, 309 U.S. 506, 512, 60 S.Ct. 653, 656, 84 L.Ed. 894 (1940)), *it has never directly considered the reach of tribal immunity in business ventures*. Indeed Justice White dissented from the denial of certiorari in *Padilla*, 490 U.S. at 1030, 109 S.Ct. at 1768, urging that the Court should have heard the case "to resolve the conflict among state courts"; Justice Stevens, concurring in *Potawatomi Tribe*, remarked that he was "not sure that the rule of tribal sovereign immunity extends to cases arising from the tribe's conduct of commercial activities off the reservation." Id. 498 U.S. at ___, 11 S.Ct. at 912 (citing the Foreign Sovereign Immunities Act).

Id. at 900.

In the *Greene* case, the Ninth Circuit considered the sovereign immunity of a furniture business that was a "wholly-owned and managed enterprise of" the tribe therein. Unlike the facts of the instant case, the tribe had not created a separate and distinct corporation to operate its business. Based upon these facts, the court in the *Greene* case, upheld the tribal sovereign immunity defense.

Two lower courts clearly have considered similar issues regarding the tribal sovereign immunity defense raised by a corporate entity not formed under Section 17 of the Indian

Reorganization Act, (25 U.S.C. § 477) such as Respondent in the instant case. The two cases are *Padilla v. Pueblo of Acoma*, 754 P.2d 845 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989) and *Dixon v. Picopa Construction Company*, 772 P.2d 1104 (Ariz. 1989).

In *Padilla*, the New Mexico Supreme Court considered the application of sovereign immunity to the "Pueblo of Acoma d/b/a Sky City Contractors" an *unincorporated* association that registered to do business in New Mexico and which was conducting business in the mainstream of commerce. Sky City Contractors, when sued for beach of contract, raised a sovereign immunity defense and the court struck it down. The *Padilla* court said:

> The United States Supreme Court has held that the doctrine that 'no sovereign may be sued in its own courts without its consent' does not necessarily support a claim of immunity in another sovereign's courts. *Nevada v. Hall*, 440 U.S. 410, 99 S.Ct. 1182, 59 L.Ed. 416 (1979), aff'g *Hall v. University of Nevada*, 74 Cal. App.3d 280, 141 Cal.Rptr. 439 (1977) (Hall II). For reasons well articulated in *Hicks v. State*, 88 N.M. 588, 544 P.2d 1153 (1975), the doctrine of sovereign immunity does not find favor in the common law of this state. . . . Having found no provision under the supreme law of the land that prohibits a state's exercise of jurisdiction over sovereign Indian tribes for off-reservation conduct, we believe the exercise of jurisdiction over sovereign Indian tribes for off-reservation conduct is solely a matter of comity.

Padilla, 754 P.2d at 850. The facts of the instant case are even more favorable to Petitioner than those in *Padilla*, because Respondent Little Six, Inc. is a separate *incorporated* entity not formed under Section 17 of the Indian Reorganization Act, and it additionally registered to transact business in Minnesota pursuant to Minnesota Foreign Corporations Act.

Dixon v. Picopa Construction Company, 772 P.2d 1104 (Ariz. 1989) is a case which is close to being "on all fours" with the instant case. In *Dixon*, the Arizona Supreme Court

considered the application of the sovereign immunity defense to the "Picopa Construction Company" which was a separate corporation formed under an ordinance passed by the Salt River Pima-Maricopa Indian Community. The facts of the instant case are even more favorable to Petitioner than those in *Dixon*, because, unlike Little Six, Inc. herein, Picopa Construction Company did not register with the Arizona Corporation Commission and did not appoint an agent for service of process in the state. *Dixon*, 772 P.2d at 1106. The *Dixon* court held that Picopa Construction Company was not entitled to assert sovereign immunity. The Arizona Supreme Court explained:

> Congress's provision for allowing Indian tribe's to segregate themselves into governmental and commercial corporate units, . . . arguably implies that "Congress did not intend all commercial activity" undertaken by Indian entities be immune from suit. Thus Congress itself recognized that immunity may have deleterious effects on a tribe's economic development. The court of appeals held that the mere act of incorporation did not waive tribal immunity. Although that statement is correct, in this instance it overlooks the real issue. The waiver issue does not arise until Picopa first establishes that it has immunity to waive. We hold that Picopa is not a subordinate economic organization within the meaning of White Mountain Apache[4] and S. Unique[5], and hence may not assert immunity. *Further, on this record, as a separate corporate entity, Picopa is not entitled to assert immunity in its own right for its off-reservation commercial activities.* (emphasis added) (citations omitted).

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[4] Referring to *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (Ariz. 1971).

[5] Referring to *S. Unique v. Gila River Pima Maricopa Indian Community*, 138 Ariz. 378, 674 P.2d 1376) (Ariz. Ct. App. 1983), rev. denied (1984).

Dixon, 772 P.2d at 1111-1112. The analysis of the *Dixon* case is justifiable and sound under the facts of that case, as well as the parallel yet more persuasive facts of the instant case. Thus, the Minnesota courts decisions are at odds with *Dixon* and *Padilla*, as they allow Respondent to successfully assert the defense of *tribal* sovereign immunity for off-reservation business activity. Recognizing this, Chief Justice Keith in his dissenting opinion stated:

> Like LSI, the Picopa Construction Company involved in the *Dixon* case had a board of directors separate from the tribal government and with exclusive administration control of the corporations day-to-day operations, was instituted as a for-profit business venture with the Community as the sole shareholder, was not organized under Section 17 of the Indian Reorganization Act, and was not intended to carry out the Community's governmental functions. Id. at 1107-11. I would follow the Arizona court's in *Dixon* and *Shelley*[6], and require that a business incorporated under tribal law show itself to be an extension of the tribal government in order to take advantage of the tribe's sovereign immunity defense. In this case, it is clear that LSI does not meet this test.

Gavle v. Little Six, Inc., 555 N.W.2d 284, 300 (Minn. 1996) (Keith, C.J., dissenting) (App. 35).

The foregoing cases, including Justice White's recognition of the clear conflict among state courts, (*See*, *Padilla*, 490 U.S. at 1030, 109 S.Ct. at 1768) all arose before the creation of the entire Indian gaming industry resulting from the Indian Gaming Regulatory Act (IGRA), 25 U.S.C.

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[6] *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (Ariz. 1971).

§§ 2701-2721 (1988)[7]. We have witnessed the mass proliferation of tribal casino gambling operations throughout the United States in the 1990's. Current estimates are that there are now over 250 Indian gambling casino operations in the United States. The number and size of these Indian gambling casino's are quickly expanding. Many have become destination resorts with the construction of large hotels, restaurants, shops and entertainment forums. This economic explosion has also resulted in the diversification of the business interests of tribes and tribal corporations, including the acquisition of off-reservation businesses operating in the main stream of commerce in the United States. Respondent, Little Six itself owned and operated a construction company in North Dakota and a supply company in Minnesota.

The undeniable corollary of this proliferation is that, compared to 1989 when Justice White urged the Court to hear *Padilla* "to resolve the conflict among state courts", there are hundreds of thousands more United States citizens who today, visit, patronize and are employed by Native American owned businesses both on and off reservation lands. The relatively minor conflicts that existed in 1989, have expanded and have continued to grow at an exponential rate along with the multi-billion dollar Indian gambling industry across the nation.

The practical and devastating impact of the Minnesota court's decision in this case is to allow off-reservation business to be conducted in the State of Minnesota (or anywhere else) with total immunity! The law must be clarified and harmonized to provide for fair and equitable remedies for

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[7] The Minnesota Supreme Court incorrectly held that all Indian gaming is conducted pursuant to the IGRA and that as a matter of federal law, Respondent must be a tribal entity in order to conduct gaming authorized by statute. *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 295 (Minn. 1996). (App. 23). However, this analysis is in error. While it may be that only tribes can own tribal casinos, non-tribal corporations may be hired to manage the operations for the tribe, and individual ownership of Class III gaming may be allowed. See 25 U.S.C.§ 2711(3) and 25 CFR § 522, § 522.10. Respondent was managing the casino in the instant case and also had other operations beyond managing the casino.

employer and patrons. Tribal members and non-tribal members alike, who are employed by, or knowingly or *unknowingly*[8], conduct business with Indian owned businesses, particularly off the reservation, should not be denied a remedy at law. The decision below creates an unnecessarily and irresponsibly dangerous business atmosphere for the conduct of Indian owned businesses. Abuses will continue to be perpetrated with impunity, unless laws are applied uniformly to all employers. The court in *Namekagon Development Company, Inc. v. Bois Forte Reservation Housing Authority*, 395 F.Supp. 23, 28 (D. Minn. 1974) addressed the issue in these terms:

> To dismiss this suit against the local housing authority on grounds of sovereign immunity would be grossly unfair. . . . It invited outsiders to do business with it . . . 'It is repugnant to the American theory of sovereignty that an instrumentality of the sovereign shall have all of the rights and advantages of a trading corporation in the ability to sue and yet itself be immune from suit and be able to contract with others, or to injure others, confident that no redress may be had against it as a matter of right . . . ' [citation omitted].

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[8] Petitioner was a 23 year old college student looking for part time work, while she put herself through college. She went to work as an hourly security guard for Little Six, Inc., which, from all appearances was just another corporate employer. Little Six, Inc. advertised itself in the newspaper as "one of the fastest growing businesses in Minnesota." (App. 74). Mystic Lake Casino was also represented as "a division of Little Six, Inc." No mention was made of sovereign tribal status. It is unreasonable to expect her, as an hourly employee, without union or other support, to understand the nuances of tribal sovereign immunity, realize the extent of her protection under the law (or lack thereof), and negotiate appropriate protection. Generally, the hundreds of thousands of individuals across the country in a position like Petitioner's, do not have the understanding or the bargaining power to protect themselves. Petitioner, did not know she was going to work for an employer who was not bound by any of the laws that we have all fought long and hard to realize.

See also, *Duluth Lumber v. Delta Development, Inc.*, 281 N.W.2d 377, 383 (Minn. 1979).

It is socially, economically and legally repugnant to unnecessarily allow such conditions to continue unabated in the United States, as if they were occurring in some remote part of the world beyond the reach of our long standing notions of democracy.

C. The Opinion Below Is Inconsistent With This Court's Previous Opinions Interpreting The Requirements Needed To Establish A Waiver Of The Tribal Sovereign Immunity Defense.

The lower court's decision contradicts controlling precedent regarding the validity of waivers of tribal sovereign immunity. Native American tribes have a common-law immunity from suit similar to that accorded sovereign powers. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978). This immunity bars suits against Native American communities absent a clear waiver of immunity by the community or by congressional act. *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L.Ed.2d 1112 (1991). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara*, 436 U.S. at 58, 98 S.Ct. at 1677. *Blacks Law Dictionary*, 1370 (5th ed. 1979), defines "unequivocal" as "clear; plain; capable of being understood in only one way, or as clearly demonstrated. Free from uncertainty, or without doubt. . . . " The Eighth Circuit recently found a waiver in an arbitration clause. The Eighth Circuit reiterated that the:

> Supreme Court has expressed its protectiveness of tribal sovereign immunity by requiring that any waiver be explicit, it has never required the invocation of '**magic words**' stating that the tribe hereby waives its sovereign immunity."(emphasis added).

Rosebud Sioux Tribe v. Val-U Constr. Co., 50 F.3d 560 (8th Cir.1995), *reh'g denied* (April 21, 1995) *cert. denied*, 116 S.Ct.78 (1995). Following the teachings of *Santa Clara* some

courts have indicated that an appropriate analysis requires looking for an affirmative textual waiver of immunity. *Pan American Co. v. Sycuan Band*, 884 F.2d 416, 419 (9th Cir. 1989). Other lower courts have followed *Santa Clara*, in finding that there are many ways in which a tribe may waive the sovereign immunity defense. Minnesota Courts have previously recognized that "[o]ne of the ways a tribe can waive its sovereign immunity is by including a 'sue and be sued' clause in a relevant document." (emphasis added). *McCarthy & Assoc. v. Jackpot Junction*, 490 N.W.2d 156,158 (Minn. App.1992), citing *Fontanelle v. Omaha Tribe of Neb.*, 430 F.2d 143, 147 (8th Cir. 1970). A "sue and be sued" clause is nothing more than an expression that the entity has consented to be sued. In the instant case, the written consent to be sued is "irrevocable" and is contained on the face of the voluntary application filed with the State of Minnesota by Respondent. (App. 64).

In the instant case, the Minnesota court acknowledged *Santa Clara* and *Rosebud Sioux*, and reiterated the rule that no magic words are required. It then proceeded to comment, "no words exist, magic or otherwise, that articulate the kind of clear abandonment of this powerful affirmative defense mandated by the Supreme Court". *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 297 (Minn. 1996) (App. 28). The Minnesota Supreme Court has impermissibly raised the standard set forth in *Santa Clara*, and made it impossible to find a waiver unless those "magic words", "the tribe hereby waives its sovereign immunity" are actually written. Indeed, the Minnesota Supreme Court said "[w]e have no 'sue and be sued' clause before us. . . . " *Gavle v. Little Six, Inc.*, 555 N.W. at 297. (App. 29).

The instant decision incorrectly limits valid waivers to the exact language contained in the "sue and be sued" clauses discussed in *Duluth Lumber v. Delta Dev., Inc.*, 281 N.W.2d 377 (Minn. 1979) (court held that tribe purposely waived immunity by enacting ordinance that provided for suits by and against business entity); and *McCarthy & Assoc. v. Jackpot Junction*, 490 N.W.2d 156 (Minn. App. 1992) (court held that tribe could be sued and that sovereign immunity was waived

by sue and be sued language in corporate charter). The lower court inexplicably discounts the explicit language found on the face of Respondent's *voluntary application* filed by its Board of Directors under Minn. Stat. § 303 (the "Application") which declares under penalties of perjury that "**The corporation *irrevocably consents to service of process* on it as provided by Minnesota Statute 303.13 or any amendment or successor thereto**". (App. 64). The applicable statutory definition of "process" includes "the summons in a civil action, and any process which may be issued in any action or proceeding in any court." Minn. Stat. § 303.02, Subd. 6. By obtaining authority to transact business in Minnesota, Respondent received a "Certificate", (App. 65) which became prima facia evidence of the matters contained on its face. Minn. Stat. § 303.23, Subd. 1. Respondent also agreed in writing to be bound by the laws of the State of Minnesota. Minn.Stat.§ 303.09. This can only be one thing, a consent to be sued in Minnesota courts, particularly, where the lower court had already determined that it had subject matter jurisdiction over the dispute. *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 292 (Minn. 1996) (App. 15-16). The clear language on the face of the Application is a consent to be sued, and thus, the requisite textual waiver of sovereign immunity by Respondent corporation. The Application language here is clear; plain; capable of being understood in only one way, and is free from uncertainty or doubt.

The written "*irrevocable* consent to service of process" found in the Application is the type of unequivocal expression required under *Santa Clara Pueblo*. The lower courts departed from *Santa Clara Pueblo* when they found that the Respondent's irrevocable consent to receive the summons in a civil action, and consent to participate in any process which may be issued in any action or proceeding in any court, was not an unequivocal consent to be sued. All the pertinent facts pertaining to the waiver and consent were clearly set forth in writing.

The primary focus and intent of the Minnesota Foreign Corporations Act and other similar state statutes is to make a foreign corporation suable and accountable in local courts for

disputes arising from their business activities in the state. The particular statutory language, form documents and filing requirements are all specifically designed to accomplish this result. Many courts, including this Court, recognized this fact long ago. The decision of the lower court also contradicts the line of cases that have grown out of *Neirbo Co. v. Bethlehem Shipbuilding Corporation*, 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed 167 (1939). "The whole purpose of requiring designation of an agent for service is to make a non-resident *suable in the local courts*." (emphasis added). *Doula v. United Technologies Corporation*, 759 F. Supp. 1377, 1382 (D. Minn. 1991). This matter is so well settled that the Eighth Circuit Court of Appeals stated the following:

> Appointment of a registered agent for service of process is not one of the specific types of *consent* listed by the Supreme Court in the cited case[9], but it is nevertheless a traditionally recognized and well-accepted species of general consent, possibly omitted from the Supreme Court's list *because it is of such long standing as to be taken for granted.* (emphasis added).

Knowlton v. Allied Van Lines, Inc., 900 F.2d 1196, 1999 (8th Cir. 1990).

> Moreover, the designation by a foreign corporation, in conformity with a valid State statute and as a condition of doing business within the state, of an agent upon whom service of process may be made, *is an effective consent to be sued in the courts of that state.* (emphasis added).

Beales v. L. D. Shreiber & Co., 56 F.Supp. 814, 815 (D. Minn. 1944), citing *Neirbo Co. v. Bethlehem Shipbuilding Corporation*, 308 U.S. 165, 60 S.Ct. 153, 84 L.Ed 167 (1939). Furthermore, a designation of an agent for service of process is "a voluntary act." *Neirbo*, 308 U.S. at 174. The cases of *Rykoff-Sexton, Inc. v. American Appraisal Associates, Inc.*, 469

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[9] i.e. See *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982).

N.W.2d 88, 90 (Minn. 1991); *Knowlton v. Allied Van Lines*, 900 F.2d 1196, 1200 (8th Cir. 1990); *Ytuarte v. Gruner + Jahr Printing and Publishing Co.*, 935 F.2d 971 (8th Cir. 1991) and *Doula v. United Technologies Corporation*, 759 F. Supp. 1377, 1382 (D. Minn. 1991) establish a well-settled principle that appointing an agent for service of process under Minn. Stat § 303.01 et seq. not only provides for jurisdiction in Minnesota Courts (as the lower courts recognized), but also constitutes a *consent to be sued* in Minnesota courts. The Minnesota Supreme Court stated in 1915 that:

> It is reasonable that a foreign corporation, keeping and maintaining agents in the state for procuring business for its benefit and profit, should *answer* in this forum to a citizen of this state for a breach of contract or duty arising out of business so procured. . . . (emphasis added).

W.J. Armstrong Co. v. New York Cent. & H.R.R. Co.,129 Minn. 104, 111, 151 N.W. 917, 919 (1915). This statement is as true today as it was 80 years ago.

The lower court clearly departed from the *Santa Clara Pueblo* and *Neirbo* line of cases, when it refused to recognize a plain and simple consent to be sued, and thus, a waiver of *tribal* sovereign immunity clearly present in the instant case.

D. The Courts of Appeals and State Courts Are Irreconcilably Split On What Is Required To Establish A Waiver Of The Tribal Sovereign Immunity Defense.

In the instant case, the lower courts have decided that a waiver of sovereign immunity hinges upon whether or not a standard "sue and be sued" clause exists. The Minnesota Supreme Court's explanation of their decision as follows, is equally erroneous:

> Quite simply, consent to service of process, and thus to personal jurisdiction, cannot be construed as an automatic waiver of an otherwise available affirmative defense. Presumably foreign corporations that register to do business in Minnesota do not

> understand that they are waiving their right to assert affirmative defenses, based, for example upon a statute of limitations, failure of consideration, accord and satisfaction and the like. Similarly, we conclude that LSI, by agreeing to service of process, cannot be said to have waived the affirmative defense of sovereign immunity.

In the instant case, Little Six, Inc. consented to be sued in Minnesota courts through a written filing that expressly stated that the corporation irrevocably consented to service of process. By operation of law and plain common sense, it waived all *jurisdictional defenses*, including the jurisdictional defense of tribal sovereign immunity.

It is clear that many forms of waivers have been readily recognized by other courts. For example, courts have held that a tribe's agreement to an arbitration clause constitutes a valid waiver of the immunity defense. See *Hydaburg Cooperative Association v. Hydaburg Fisheries*, 826 P.2d 751, 754 (Alaska 1992); and *Nenana Fuel Co., Inc. v. Native Village of Venetie*, 834 P.2d 1229, 1233 (Alaska, 1992). In the *Hydaburg* case the court stated: "[a]n arbitration clause in an agreement executed by an Indian tribe would be meaningless if it did not constitute a waiver of the tribe's immunity from suit to compel arbitration or to enforce an arbitration award." *Hydaburg*, 826 P.2d at 755.

Like the decision in *Hydaburg*, the consent to service process herein, would be a meaningless act if it did not constitute a waiver of the jurisdictional based sovereign immunity defense. A waiver may also be found in any evidence that shows intent that is inconsistent with the notion of tribal sovereign immunity. The court in *Nenana Fuel* stated:

> In *Native Village of Eyak v. GC Contractors*, 658 P.2d 756 (Alaska 1983), we held that a tribe waives its sovereign immunity by agreeing to contract terms *inconsistent with sovereign immunity*. Eyak had entered into a contract with GC Contractors under which GC Contractors was to build a community center for Eyak. Pursuant to an arbitration

> clause in the contract, the parties submitted to arbitration a dispute concerning Eyak's failure to pay money due under the contract. The arbitrator awarded GC Contractors the full sum sought and rejected Eyak's argument that it would not be bound by any arbitration decision on the grounds of sovereign immunity. Adhering to the general rule that all provisions in a contract should be found meaningful, we affirmed the superior court's confirmation of the arbitration award.

Nenana Fuel, 834 P.2d at 1232. Based upon *Santa Clara Pueblo, Rosebud Sioux, Nenana Fuel, Native Village of Eyak, Hydaburg, Duluth Lumber, McCarthy, Dacotah Properties* and many other similar cases, Respondent's Application must constitute a waiver of sovereign immunity, as the language is as clear and definite as that found in any "sue and be sued" clause or "arbitration" clause.

In *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374 (8th Cir. 1985) the Eighth Circuit set out examples of when tribal sovereign immunity has been waived. The *American Indian Agricultural Credit Consortium*, court stated:

> Tribes and persons dealing with them long have known how to waive sovereign immunity when they so wish. (See *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980) affirmed on other grounds, 455 U.S. 130, 102 Supreme Court 894, 1982) (Tribal Council Tax Ordinance expressly provides the tribe consents to suit in tribal or federal court); *Mekagon Development Company v. Bois Forte Reservation Housing Authority*, 517 F.2d 509 (Tribal Council Ordinance establishing housing authority provides: "The Council hereby gives its irrevocable consent to allowing authority to sue or be sued in its corporate name upon any contract, claim or obligation arising out of its activities . . . "); *Fontanelle v. Omaha Tribe of Nebraska*, 430 F.2d at 147 (Tribal Corporate Charter authorizes it to "sue or be sued in courts of competent

> jurisdiction"); *Maryland Casualty Company v. Citizens National Bank*, 361 F.2d 517 (5th Cir. 1966) (Tribal Constitution authorizes the tribe to "sue or be sued" but bars attachment of tribal property). . . .

American Indian Agricultural Credit Consortium, 780 F.2d at 1379.

The unsettling problem created by the lower courts decision herein, is that if, as the lower court claims, that "irrevocably" consenting to service of process does not result in the waiver of the sovereign immunity defense because *affirmative defenses are retained* by the corporation or the tribe, then, virtually all of the other state and federal court of appeals cases cited above would need to be overturned for the same rationale. Under a "sue and be sued" clause waiver like that found in numerous cases like *McCarthy & Assoc. v. Jackpot Junction*, 490 N.W.2d 156 (Minn. App. 1992), and *Fontanelle v. Omaha Tribe of Neb.*, 430 F.2d 143, 147 (8th Cir. 1970), the tribe would still have all of its affirmative defenses, including tribal sovereign immunity. Under an "arbitration clause" waiver like the one found in numerous cases like *Hydaburg Cooperative Association v. Hydaburg Fisheries*, 826 P.2d 751, 754 (Alaska 1992), and *Nenana Fuel Co., Inc. v. Native Village of Venetie*, 834 P.2d 1229, 1233 (Alaska, 1992), the tribe would still retain all of its affirmative defenses and could successfully assert sovereign immunity within the arbitration proceeding. The decision of the Minnesota Supreme Court below cannot be reconciled with scores of long-standing cases recognizing the various forms that a waiver of immunity may take, other than the "magic words", "the tribe hereby waives its sovereign immunity." *Rosebud Sioux Tribe v. Val-U Constr. Co.*, 50 F.3d 560 (8th Cir.1995), *reh'g denied* (April 21, 1995) *cert. denied*, 116 S.Ct.78 (1995).

The Minnesota Supreme Court's reliance on *Ransom v. St. Regis Mohawk Education and Comm. Fund, Inc*, 86 N.Y.2d 553, 658 N.E.2d 989, 635 N.Y.S.2d 116 (1995) is misplaced, confusing and further accentuates the irreconcilable split among the lower courts. The Minnesota Supreme Court first determined that it in fact had personal and subject matter

jurisdiction in the instant case. *Gavle v. Little Six, Inc.*, 555 N.W.2d 284, 292 (Minn. 1996). (App. 15-16). However, in discussing Respondent's Application and Certificate of Authority to Transact Business in Minnesota (App. 63-65), it cited *Ransom* for the following:

> the mere fact that a tribal corporation, by statute, has designated an agent for service of process or is empowered to 'sue and be sued' does not automatically subject that corporate entity to any court's jurisdiction *where jurisdiction is otherwise lacking*. (emphasis added).

See *Gavle v. Little Six, Inc.*, 555 N.W.2d at 297. (App. 29). In *Ransom*, there was no written Application whereby the corporation "irrevocably consented to service of process" in New York courts. For purposes of refusing to find a waiver, the Minnesota Supreme Court went on to say "[w]e agree with this analysis" *Id.* The flawed logic is evident. The *Ransom* case turned upon the fact that the New York Court of Appeals could not find that it had jurisdiction based upon the New York statute. Here, the Minnesota court had already determined that it had jurisdiction over this matter before it even discussed waiver and the *Ransom* case. Once the Minnesota Supreme Court found that it had jurisdiction, *Ransom* became irrelevant to the waiver analysis.

CONCLUSION

Laws and doctrines are not made and enforced in historical and political vacuums. The protection allowed the Indian tribes under the doctrine of sovereign immunity arose during a very different day and age. This case must be looked at under the light of the modern day. It may be that tribal sovereign immunity has its valid place for the right reasons, including matters which are wholly internal to a tribe. This is not one of those cases. The "anachronistic fiction" of tribal sovereign immunity, with its origins based in racial segregation, should not operate to negate Petitioner's basic constitutional rights. "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people

whose institutions are founded upon the doctrine of equality". *Hirabayashi v. United States*, 320 U.S. 81 (1943).

For the forgoing reasons, the Petition of Jill Gavle should be granted and a Writ of Certiorari issued to the Minnesota Supreme Court.

Dated: January 28, 1997

Respectfully submitted,

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APPENDIX A

STATE OF MINNESOTA

IN SUPREME COURT

CO-95-133

Court of Appeals Gardebring, J.
Dissenting, Keith, C.J. and Coyne, J.

Jill Gavle, petitioner,

Appellant,

vs.

Filed: October 31, 1996
Office of Appellate Courts

Little Six, Inc., a foreign corporation
d/b/a Mystic Lake Casino, et al.,

Respondents.

SYLLABUS

1. Although jurisdiction may be concurrent with that of a tribal court, state courts have subject matter jurisdiction over a cause of action involving a tribal-owned corporation and a nonmember when the alleged acts from which the cause of action arose occurred both within and outside of Indian country.

2. The affirmative defense of sovereign immunity may be extended from a tribe to a tribal business entity, if the business entity is organized for a governmental purpose and closely linked to the tribe and if the extension of immunity furthers federal policies intended to promote tribal autonomy.

3. Absent an express and unequivocal waiver of sovereign immunity, a tribal business entity possessing

the affirmative defense shall not be deemed to have waived it. Registration with the Secretary of State as a foreign corporation is not such a waiver.

Affirmed.

Heard, considered and decided by the court en banc.

OPINION

GARDEBRING, Justice.

This case is a tort action filed by appellant Jill Gavle against Little Six, Inc. (LSI) and three of its officers. The suit alleged several tortious acts, including sexual harassment, pregnancy and racial discrimination, civil rights violations and other torts, arising from her employment with LSI. The trial court granted LSI's motion for summary judgment, holding that sovereign immunity barred Gavle's claims against LSI. The court of appeals affirmed, concluding that the trial court had both subject matter and personal jurisdiction over LSI, but agreeing with the trial court that sovereign immunity was a bar to the suit. We affirm on the basis that, while state courts may have concurrent jurisdiction with tribal courts in civil matters arising both in and outside of Indian country, the sovereign immunity of the Shakopee Mdewakanton Sioux (Dakota) Community extends to LSI and is a bar to this suit in a state court.

The Shakopee Mdewakanton Sioux (Dakota) Community (the Community) is a federally recognized Indian tribe. LSI, a tribal business entity incorporated under the Community corporate ordinance in 1991, has issued one

share of stock owned by all voting members of the Community. LSI is registered with the state of Minnesota as a foreign corporation transacting business within the state. LSI owns a gambling casino which is in Mdewakanton Indian Country.[1]

The Community has, through the corporate ordinance, granted certain privileges and protections to LSI:

> 4.11 A Corporation wholly owned by the Community may assume any or all of the Community's rights, privileges and immunities (including, without limitation, sovereign immunity) concerning federal, state or local * * * jurisdiction to the same extent that the Community would have such rights, privileges, and immunities if it engaged in the activities undertaken by the Corporation.
>
> 4.12 A corporation wholly owned by the Community, shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Community, and other courts of competent jurisdiction * * * .

Shakopee Mdewakanton Sioux Community Corporation Ordinance §§ 4.11, 4.12 (amended, July 27, 1994). In turn, LSI's articles of incorporation set out the purpose of the corporation and limit both the reach of immunity extended by the Community and the extent of the corporation's ability to consent to be sued:

> 3.0 Purposes and Powers. The purposes for which the Corporation is organized are to

---

[1] "Indian Country" includes land within Indian reservations, dependent Indian communities, and Indian allotments. 18 U.S.C. § 1151 (1994).

> engage in any lawful act or activity * * * [which seeks] to improve the business, financial or general welfare of the Corporation, the Members of the Corporation, and the Community.
>
> 3.1 Sovereign Immunity of Corporation. The Shakopee Mdewakanton Sioux Community confers on the corporation all of the Community's rights, privileges and immunities concerning federal, state and local * * * jurisdiction, and sovereign immunity from suit * * * . Such immunity shall not extend to actions against the Corporation by the Community or Members of the Corporation.
>
> 3.2 Consent to Sue and be Sued Required. The Corporation shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Shakopee Mdewakanton Sioux Community or another court of competent jurisdiction; * * * . Consent to suit by the Corporation shall in no way extend to the Community, nor shall a consent to suit by the Corporation in any way be deemed a waiver of any of the rights, privileges and immunities of the Community.

Articles of Incorporation of Little Six, Inc. §§ 3.0, 3.1, 3.2 (Mar. 18, 1991) (hereinafter Articles of Incorporation).

LSI employed Gavle as a security guard from March 1992 to January 1993. Her job included duties at the casino (in Indian Country) and at LSI's temporary administrative offices at the Canterbury Downs complex in Shakoppe, Minnesota. While Gavle's complaint details many incidents, alleged to be tortious, that occurred at the casino, it also contends that some of the allegedly

tortious acts took place away from the casino, in or near Shakopee.[2]

At the heart of this case is the issue of whether tribal business entitles are subject to the application of state civil law in state court. To answer this question, we must analyze two related legal concepts – jurisdiction and sovereign immunity. Though it is sometimes said that state or federal courts are deprived of jurisdiction through the application of tribal sovereign immunity, the concept is more properly thought of as an affirmative defense, to be asserted by a tribe, tribal official or tribal entity as a bar to a particular lawsuit. Further, there are instances when a state or federal court may have jurisdiction over a matter involving a tribe or tribal entity, but may choose to stay its action, deferring to the concurrent jurisdiction of a tribal court. Thus, we must consider four related yet discrete issues:

a. Do Minnesota courts have jurisdiction over a tribal business entity in a civil tort matter involving actions occurring both within and outside of Indian country?

b. If Minnesota courts have such jurisdiction, must they stay their exercise of that jurisdiction in consideration of concurrent tribal court jurisdiction, under the doctrine of "infringement"?

c. If Minnesota courts have such jurisdiction and choose to exercise it, is such a suit nevertheless barred by tribal sovereign immunity?

---

[2] Gavle's allegations of injury involve actions by defendants Leonard Prescott, Allene Ross and William Johnson, corporate officers of LSI, but those individual claims are not at issue here.

d. If sovereign immunity would otherwise be available in this case, has it been waived by LSI's registration with Minnesota's Secretary of State as a foreign corporation?

Historical Background

To provide context for our discussion of these complex issues, we begin with some discussion of the historical relationship of Indian tribes to the state and federal governments. There are over 500 federally recognized tribes in the United States. David H. Getches, Charles F. Wilkinson, Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law* 4 (3rd ed. 1993), Felix S. Cohen's commentary best describes the historical relationship between the United States and Indian tribes:

> Indian policy is marked by idealistic periods such as the first years of the Republic, when Congress pledged that 'the utmost good faith shall always be observed toward the Indian,' and the 1930's, when a commitment was made to revive tribal governments. Other eras were less altruistic: the period of removal, when hundreds of tribes were evicted forcibly from their ancestral lands; the allotment era, which resulted in the loss of ninety million acres of tribal lands; and the termination period, when more than one hundred tribes were stripped of the federal-tribal relationship and, in most cases, of their land.

Felix S. Cohen, *Handbook of Federal Indian Law* 49 (1982 ed.) (hereafter Cohen, *Federal Indian Law*).

In general, the federal government has viewed the Native American more as a "political entity" than as a

racial minority.[3] Thus, until 1871 the United States recognized Indian tribes as possessed of the attributes of nationhood and, accordingly, concluded treaty agreements with them. *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 305-06 (1902). For over one hundred years however, this country has systematically brought the various Indian tribes under the auspices of the federal government as "domestic dependent nations." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). In exchange for ceded land, the federal government gave Indian tribes special status that only Congress may remove. Indian tribes are not states; nevertheless, they possess a kind of sovereignty superior to that of states but inferior to that of the federal government. *Stephens v. Cherokee Nation*, 174 U.S. 445, 484-86 (1899); *see Colliflower v. Garland*, 342 F.2d 369, 374-76 (9th Cir. 1965). They are "subordinate and dependent nations possessed of all powers as such" and limited only "to the extent that they have expressly been required to surrender [their powers] by the superior sovereign, the United States." *Native American Church of North America v. Navajo Tribal Council*, 272 F.2d 131, 134 (10th Cir. 1959). Thus federally recognized tribes hold certain powers and privileges allowed other sovereigns; jurisdiction over certain judicial matters and sovereign immunity are two such characteristics.

Jurisdiction

Judicial jurisdiction over matters involving Indians or Indian tribes is a function both of territory – where the

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[3] Getches, et al., *Federal Indian Law* at 8.

matters arise – and of subject matter – what the nature of the claim is. "A court's jurisdiction may depend not only on the location of events but also on the race of the parties or the subject matter of the case." Cohen, *Federal Indian Law, supra,* at 281. Given the pervasive sweep of federal law in Indian matters and the deference to Indian sovereignty within that law, jurisdiction of state courts over both civil and criminal matters involving Indians is governed by federal statute or case law. In *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 561 (1832), the U.S. Supreme Court held that, absent federal action, Indian tribes are not subject to the jurisdiction asserted over them by a state. The Court reaffirmed this holding over 100 years later in *Bryan v. Itasca County Minnesota,* 426 U.S. 373, 392 (1976) (quoting *Oklahoma Tax Commission v. United States,* 319 U.S. 598, 613-14 (1943) (Murphy, J., dissenting)), when it said: "Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate * * * immunity and allow states to treat Indians as part of the general community." Thus, absent a grant of federal authority, state courts have no jurisdiction over Indians, Indian tribes or other Indian entities. *See, e.g., National Farmers Union Ins. Co. v. Crow Tribe of Indians of Montana,* 471 U.S. 845, 855-56 (1985); *Fisher v. District Court of the Sixteenth Judicial Dist. of Montana,* 424 U.S. 382, 387 (1976); *Williams v. Lee,* 358 U.S. 217, 220 (1959); *United States v. Kagama,* 118 U.S. 375, 384 (1886).

In some states, including Minnesota, Congress has provided for state court criminal jurisdiction for matters occurring within Indian country, 18 U.S.C. § 1162 (1994), and for civil jurisdiction in actions to which Indians are

parties. 28 U.S.C. § 1360 (1994). However, the reach of congressionally authorized state court jurisdiction provided in so-called Public Law 280[4] states does not extend to tribes entities. *See Bryan*, 426 U.S. at 389.

Jurisdiction over federally recognized tribes themselves, or tribal entities, is governed by federal case law. The U.S. Supreme Court has determined that state court jurisdiction over tribal activities that took place within Indian country would undermine the congressional aim of encouraging self-government and self-determination by the dependent tribes and "infringe on the right of the Indians to govern themselves." *Williams*, 358 U.S. at 223. However, the Court found no such infringement where the tribal activities took place off the reservation. Specifically, the Court has said "[a]bsent express federal law to the contrary, [Indian business entities] going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973). In those circumstances, the Court has held that state courts may have jurisdiction to hear the cause of action.

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[4] Public Law 280, now codified as 28 U.S.C. § 1360 (1994), identified six original states whose state courts would have jurisdiction over "civil causes of action between Indians or to which Indians are parties which arise in * * * Indian country * * *." This law was later modified by the law now codified as 25 U.S.C. § 1322 (1994) to give state courts jurisdiction over civil matters in Indian country "with the consent of the tribe." However, the original six states (Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin) all retained original civil jurisdiction even without the consent of the tribes.

This case is, of course, complicated by the fact that some of the alleged tortious acts took place within Indian country, while others did not. Since controlling federal common law turns largely on the location of the alleged tortious activity, it provides no clear guidance as to which court system may assert jurisdiction. Because this case involves non-Indian individuals and Indian tribal business entities and because it involves acts occurring both within Indian country and outside, it may be one of those cases where " 'both the tribe and the State could fairly claim an interest in asserting [our] respective jurisdictions.' " *Duluth Lumber and Plywood Co. v. Delta Development*, 281 N.W.2d 377, 382 n.3 (Minn. 1979) (quoting *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 179 (1973)).

Thus, in some respects, this jurisdictional puzzle is best considered as an issue of concurrent jurisdiction. Concurrent jurisdiction describes a situation where two or more tribunals are authorized to hear and dispose of a matter and the choice of which tribunal is up to the person bringing the matter to court. *Black's Law Dictionary* 291 (6th ed. 1990). Such a jurisdictional overlap is common between the federal and state courts as both courts are empowered to hear certain claims, such as those arising under 42 U.S.C. § 1983 (1994), *Allen v. McCurry*, 449 U.S. 90, 99-100 (1980), or the Consumer Product Safety Act, 15 U.S.C. §§ 2051-2084 (1994), *Swenson v. Emerson Elec. Co.*, 374 N.W.2d 690, 697 (Minn. 1985), *cert. denied*, 476 N.W.2d 1130 (1986). Concurrent jurisdiction conflicts are not limited to the courts of two sovereigns. Indeed, this court has held that the various district courts across the state operate as independent tribunals and,

thus, have concurrent jurisdiction. *State, ex rel. Minnesota Nat. Bank of Duluth v. District Court, Fourth Judicial District, et al.*, 195 Minn. 169, 173, 262 N.W. 155, 157 (1935).

When a concurrent jurisdiction problem arises, the proceedings of one court will usually be stayed or dismissed, often through the use of the abstention doctrine. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 806, *reh'g denied*, 426 U.S. 912 (1976). Abstention is a "narrow exception to the duty of a District court to adjudicate a controversy properly before it." *Id.* at 813. It is appropriate only in limited circumstances, when continuing federal proceedings would be improper or moot, given the anticipated outcome of state proceedings. *Id.* at 814-16. Generally, however, comity between courts will resolve instances "[w]here two actions between the same parties, on the same subject, and to test the same rights, are brought in different courts having concurrent jurisdiction, the court which first acquires jurisdiction- * * * may dispose of the whole controversy * * * ." *Minnesota National Bank of Duluth*, 195 Minn. at 173, 262 N.W. at 157. Although, unlike some concurrent jurisdiction cases, there are not two competing lawsuits here – one in tribal court and one in state court – we think that concept provides a useful framework for discussion.

In this matter, we find no federal prohibition on state court consideration of civil claims arising out of the acts of Indian business entities occurring outside of Indian country. Further, we believe Gavle would ordinarily be expected to try all her claims in one judicial proceeding; that is, it would be highly inappropriate to allow her to proceed against LSI in two judicial fora, with some allegations of tortious conduct arising within Indian country

to be considered in tribal court and those arising outside to be considered in state court. Thus, we conclude that state courts have jurisdiction of Gavle's claims, including those arising within Indian country (although, of course, tribal courts, may have jurisdiction, as well).[5]

However, as in cases involving concurrent jurisdiction, instances of jurisdictional disputes between tribal and state courts also raise the question of whether that jurisdiction should be exercised. The abstention doctrine and the "first to file" rule are not truly rules at all, but principles, a "blend of courtesy and expediency." *Medtronic, Inc. v. Catalyst Research Corp.*, 518 F. Supp. 946, 955 (D.Minn. 1981), *aff'd.* 664 F.2d 660 (8th Cir. 1981). These "principles" "should be applied in a manner serving sound judicial administration." *Orthmann v. Apple River Campground, Inc.*, 765 F.2d 119, 121 (8th Cir. 1985). In Indian law matters, the related concept is identified as "infringement," which brings us to our next issue.

---

[5] The Supreme Court has repeatedly recognized that tribal courts have inherent power to exercise civil jurisdiction over non-Indians in disputes affecting the interests of Indians which are based upon events occurring in Indian country. *Montana v. United States*, 450 U.S. 544, 566, *reh'g denied*, 452 U.S. 911 (1981). We note further that the Judicial Court of the Shakopee Mdewakanton Sioux Community has previously ruled that LSI enjoys the same sovereign immunity as the tribe itself. *See, e.g., Calver Security Systems v. Little Six, Inc.*, Court File No. 026-92, slip op. at 3-4 (Shakopee Mdewakanton Sioux (Dakota) Tribal Court June 14, 1995k).

Infringement

As LSI notes, the governing federal principle in determining whether a court should exercise concurrent jurisdiction of the kind present here is one of deference. *See, e.g., McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 175 (1973); *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973); *Duluth Lumber and Plywood Co. v. Delta Development*, 281 N.W.2d 377, 382 (Minn. 1979). The doctrine at work is referred to both as "infringement" and as "preemption."

The Supreme Court views preemption as an additional means of protecting Indian sovereignty. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). The Court held that preemption "is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state * * * and tribal interests at stake * * * to determine whether * * * the exercise of state authority would violate federal law." *Id.* at 145. Further, the Supreme Court, in *Williams v. Lee*, held that the general rule is that the exercise of state court jurisdiction must not "undermine the authority of the tribal courts over Reservation affairs" nor "infringe on the right of Indians to govern themselves." 358 U.S. 217, 223 (1959). The Iowa Supreme Court, considering a similar question, said "[i]f the state interest is greater and does not encroach on Native American interests, the state may act." *Meier v. Sac and Fox Indian Tribe of the Mississippi in Iowa*, 476 N.W. 2d 61, 64 (Iowa 1991).

The Court expanded upon this principle in two cases, *National Farmers Union Ins. Co. v. Crow Tribe of Indians*,

and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987). *LaPlante* involved the question of whether a federal court should "stay its hand" in order to allow a tribal court a "full opportunity to determine its own jurisdiction." *LaPlante*, 480 U.S. at 16 (quoting *National Farmers Union*, 471 U.S. at 857). In *National Farmers Union*, the Court held that exhaustion of tribal court remedies allowed the tribal court the opportunity to explain why it took jurisdiction and allowed other courts the opportunity to benefit from the tribal court's "expertise in such matters * * * ." *National Farmers Union*, 471 U.S. at 857. The *LaPlante* court held that no state court jurisdiction could "interfere with tribal sovereignty and self-government" of a tribe as a "matter of federal law." *LaPlante*, 480 U.S. at 15. However, the Court went on to state that "[e]xhaustion is required as a matter of comity, not as a jurisdictional prerequisite." *Id.* at 16 n.8.

The Supreme Court's reasoning in many of the infringement cases turns upon the vital role that tribal courts play in tribal self-government, especially where the question to be considered is, in the first instance, the jurisdictional limits of the tribal courts themselves. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332-333 (1983); *United States v. Wheeler*, 435 U.S. 313, 332 (1978). However, the infringement doctrine has also been considered in contexts other than questions of the tribal court's jurisdiction. For example, the question of the validity of certain claims alleged to arise under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461 (1994), has been held to require exhaustion of tribal court remedies before a federal district court will take jurisdiction. *Prescott v. [illegible] Six, Inc.*, 897 F.Supp.

1217, 1224 (D. Minn. 1995); *see also Reservation Telephone Cooperative v. Three Affiliated Tribes of Fort Berthold Reservation*, 76 F.3d 181 (8th Cir. 1996) (validity of tribal taxation of telephone lines and rights-of-way); *Pittsburgh & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995), *reh'g denied* (May 23, 1995) (validity of tribal taxation of coal mining "source gains").

It should also be noted that the application of the infringement doctrine occurs largely in federal court. There are few instances of a state court deferring to the jurisdiction of a tribal court, where they shared concurrent jurisdiction. Further, we have found few cases in which a state court has been asked to require exhaustion of tribal court remedies when the underlying question to be resolved is whether a tribal business entity may assert the tribe's sovereign immunity. *See, e.g., Padilla v. Pueblo of Acoma*, 107 N.M. 174, 754 P.2d 845 (1988), *cert. denied, Pueblo of Acoma v. Padilla*, 490 U.S. 1029 (1989); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 378, 674 P.2d 1376 (Ariz. Ct. App. 1983); *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (1971). The opinions in these cases do not address the question of the jurisdiction of the state court to decide the sovereign immunity issue because jurisdiction was, apparently, assumed to exist. Therefore, we are left without controlling precedent or even persuasive case law on the issue of whether a state must defer to the tribal court on the question of whether a tribal business entity may assert the defense of sovereign immunity.

Although the question is a close one, we conclude that the consideration by Minnesota state courts of

whether LSI may assert the defense of sovereign immunity does not "undermine the authority of the tribal courts" nor "infringe on the ability of Indian tribes to govern themselves." *Williams*, 358 U.S. at 223. Minnesota state courts have a strong interest in determining for our citizens the nature of the legal claims that they may assert against tribal business entities and the defenses that may be raised in response. *See Myers v. Government Employees Ins. Co.*, 302 Minn. 359, 366, 225 N.W.2d 238, 243 (1974). Furthermore, contrary to LSI's assertions, we do not seek to change the tribal laws, to reduce the community's ability to govern itself, or to remove the tribal court's jurisdictional claims to actions involving on-reservation activities. Instead, we choose to take jurisdiction only to establish Minnesota law on the issue of sovereign immunity for tribal business entities, in the hope that in so doing, we may avoid future disputes and pave the way to better understanding between the judicial systems.

Sovereign Immunity

Because we have jurisdiction to hear Gavle's claim, and we choose to exercise it, we now address the issue of sovereign immunity. It is settled law that tribes have the privilege of sovereign immunity, granted to them by Congress and existing at the sufferance of Congress. *Rice v. Rehner*, 463 U.S. 713, 719 (1983). "Indian tribes enjoy immunity because they are sovereigns predating the Constitution, and because immunity is thought necessary to promote federal policies of tribal self-determination, economic development, and cultural autonomy." *American Indian Agricultural Credit Consortium, Inc., v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985) (citations

omitted). Sovereign immunity has been successfully asserted as an affirmative defense to suit in federal or state court by tribes and their officers acting within the scope of their authority, and by some tribal entities. *See, e.g., United States v. Kagama,* 118 U.S. 375, 383-84 (1886); *Weeks Construction, Inc. v. Oglala Sioux Housing Authority,* 797 F.2d 668, 671 (8th Cir. 1986); *Snow v. Quinault Indian Nation,* 709 F.2d 1319, 1321 (9th Cir. 1983), *cert. denied,* 467 U.S. 1214 (1984).

The question before us today is whether LSI is the kind of tribal entity, analogous to a governmental agency, which should benefit from the defense of sovereign immunity, or whether it is more like a commercial business enterprise, instituted solely for the purpose of generating profits for its private owners. Gavle argues that LSI is a mere commercial activity, a corporation organized to generate profits, which happens to have its principal place of business on the reservation and whose owners happen to be Indians. Relying on the Arizona state supreme court decision in *Dixon v. Picopa Constr. Co.,* 160 Ariz. 251, 772 P.2d 1104 (1989), she contends that LSI serves no function akin to that of tribal government and thus cannot benefit from the sovereign immunity possessed by the tribe. Referring to its earlier case of, *White Mountain Apache Indian Tribe v. Shelley,* 107 Ariz. 4, 480 P.2d 654 (1971), which extended sovereign immunity to a tribal owned business entity, the *Dixon* court held that Picopa Construction Co., a tribal-owned corporation, was not a "subordinate economic organization" and thus did not have sovereign immunity. *Dixon,* 160 Ariz. at 258, 772 P.2d at 1111.

LSI, in turn, argues that the corporation was organized under the tribal ordinances and empowered with the same rights and privileges as the tribe. LSI points to a number of cases in which courts have extended the reach of a tribe's sovereign immunity to entities that were, in some way, subordinate organizations of the tribe. The Eighth Circuit has, for example, held that immunity existed for a tribal-chartered housing authority. *Weeks Construction*, 797 F.2d at 671; *Namekagon Development Co., Inc. v. Bois Forte Reservation Housing Auth.*, 395 F. Supp. 23, 28 (D. Minn. 1974), *aff'd*, 517 F.2d 508 (8th Cir. 1975). The New York Court of Appeals recently found sovereign immunity extended to a non-profit, state-chartered corporation. *In re Ransom v. St. Regis Mohawk Education & Community Fund, Inc.*, 86 N.Y.2d 553, 560, 658 N.E.2d 989, 993, 635 N.Y.S.2d 116, 120 (1995). Finally, the Seventh Circuit Court of Appeals has held that a contract with a wholly-owned tribal corporation, whose manufacturing facility was located within the boundaries of a reservation, was to be treated as a contract with the tribe itself. *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 809-10 (7th Cir. 1993), *cert. denied, Sioux Mfg. Corp. v. Altheimer & Gray*, 510 U.S. 1019 (1993).

The connection between a tribal housing agency or social service agency and its "parent" tribe is relatively clear. But, the demarcation between those business entities so closely related to tribal governmental interests as to benefit from the tribe's sovereign immunity and those so far removed as to be treated as mere commercial enterprises is not as clear. As noted in a recent federal circuit court opinion, "whether tribal sovereign immunity now extends to commercial activities is an important,

complex and unresolved question," which the U.S. Supreme Court has never directly considered. *In re Greene v. Mt. Adams Furniture*, 980 F.2d 590, 600-601 (9th Cir. 1992), *cert. denied, Richardson v. Mt. Adams Furniture*, 510 U.S. 1039 (1994) (Rymer, J., concurring). It may be, as a federal district court in Wisconsin determined in a case with facts closely analogous to the instant case that " 'an action against a tribal enterprise is, in essence, an action against the tribe itself.' " *Barker v. Menominee Nation Casino*, 897 F.Supp. 389, 393 (E.D. Wis. 1995) (quoting *Local IV-302 Int'l Woodworkers Union of Am. v. Menominee Tribal Enter.*, 595 F.Supp. 859, 862 (E.D. Wis. 1984)). In *Barker*, a tribal gaming commission and casino were found to be immune from suit. 897 F.Supp. at 393. To aid our analysis, we turn to the criteria that courts other than the U.S. Supreme Court have developed in examining similar fact patterns.

In *Shelley*, the Arizona Supreme Court, in addition to examining the closeness of the connection between the tribe and the business entity, looked to the intended purpose of the business entity. *Shelley*, 107 Ariz. at 7, 480 P.2d at 657. Applying this standard in the *Dixon* case, the Arizona court rejected the Picopa Construction Co.'s request for sovereign immunity partly because the business entity at issue was formed "solely for business purposes and without any declared objective of promoting the * * * general tribal or economic development * * * ." *Dixon*, 160 Ariz. at 257, 772 P.2d at 1110. Thus, the *announced purpose* for which the business entity was formed is a strong factor in determining whether it may benefit from the tribe's sovereign immunity.

In addition to considering the general purpose for which the business entity was formed, the *Dixon* court also identified the following questions as important factors to determine the extension of sovereign immunity.

> 1) Was the business entity formed to manage or exploit specific tribal resources?
>
> 2) Would the federal policy designed to protect Indian assets and tribal cultural autonomy be furthered by extension of sovereign immunity to the business entity?

Dixon, 160 Ariz. at 257-58, 772 P.2d at 1110-11.

A more detailed approach was recently adopted by the New York Court of Appeals. The court outlined six factors to be considered in determining whether a tribal business entity should be extended the protection of sovereign immunity enjoyed by the tribe itself:

> 1) whether the entity is organized under the tribe's laws or constitution rather than federal law;
>
> 2) whether the organization's purposes are similar to or serve those of the tribal government;
>
> 3) whether the organization's government body is comprised mainly of tribal officials;
>
> 4) whether the tribe has legal title or ownership of property used by the organization;
>
> 5) whether tribal officials exercise control over the administration or accounting activities of the organization; and

> 6) whether the tribe's governing body has power to dismiss members of the organization's governing body.

In re Ransom, 86 N.Y.2d at 559, 658 N.E.2d at 992, 635 N.Y.S.2d at 119.

Taking into account the reasoning of these cases, we conclude that the principal factors to be considered in determining whether tribal sovereign immunity extends to a tribal business entity are three:

> 1) whether the business entity is organized for a purpose that is governmental in nature, rather than commercial;
>
> 2) whether the tribe and the business entity are closely linked in governing structure and other characteristics; and
>
> 3) whether federal policies intended to promote Indian tribal autonomy are furthered by the extension of immunity to the business entity.

Applying these factors to the facts at hand, we conclude that, as a tribal business entity, organized for the general benefit of the Community and closely linked to the governing structure of the Community, LSI is entitled to sovereign immunity from civil action in state court.

First, we note that LSI was created for the specific purpose of "improv[ing] the business, financial or general welfare of the Corporation, the Members of the Corporation, and the Community." Articles of Incorporation, *supra*, at § 3.0. While Gavle may argue that LSI's economic activity serves no governmental purpose, the U.S. Supreme Court, in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), relied upon the Bureau of

Indian Affairs' view that "tribal bingo enterprises are an appropriate means by which tribes can further their economic self-sufficiency, the economic development of reservations and tribal self-determination." *Id.* at 217-18 n.21 (quoting an affidavit submitted to the court by the Director of Indian Services for the Bureau of Indian Affairs). This seems to recognize the unique role that Indian gaming serves in the economic life of here-to-fore impoverished Indian communities across this country.

As noted by the Fifth Circuit Court of Appeals, "[t]he fact that the [tribe] was engaged in an enterprise private or commercial in character, rather than governmental, is not material [to the availability of sovereign immunity]. It is in such enterprises and transactions that the Indian tribes and the Indians need protection." *Maryland Cas. Co. v. Citizens Nat. Bank of West Hollywood,* 361 F.2d 517, 521 (5th Cir.), *cert. denied, Maryland Cas. Co. v. Seminole Tribe of Florida, Inc.,* 385 U.S. 918 (1966).

Further, LSI is owned wholly by the Community, as a governmental unit, unlike business enterprises organized under the corporate laws of Minnesota, the ownership of which is typically vested in private citizens, for their personal benefit. LSI's Board of Directors must include at least three members of the Community Business Council and a majority of the Board of Directors must be members of the Community. Articles of Incorporation, *supra,* at §§ 7.3 and 7.41. Also, directors may be removed from office in a proceeding commenced by 10% of the corporation (who are all of the members of the Community) in the Mdewakanton Sioux Community Court. *Id.* at § 7.152.

There is, therefore, a close link between the Community and the management of LSI.[6]

We also note that federal statutory law supports the notion that gaming activity is closely linked to the well-being of the tribe. All Indian gaming is conducted pursuant to the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-2721 (1994). Under the provisions of IGRA, only tribal entities can engage in Indian gaming and gaming by Indian tribes is recognized as a "means of promoting tribal economic development, self-sufficiency and strong tribal governments." 25 U.S.C. § 2702 (1994). Thus, as a matter of federal law, LSI must be a tribal entity in order to conduct gaming authorized by the statute. A mere commercial activity, incorporated by Indian individuals for the ostensible purpose of conducting gaming in Indian country, would be prohibited from doing so under federal law. This seems to us a strong recognition of the close link between the tribe itself and LSI, the gaming business entity, and also of the federal policy encouraging tribal economic well-being through the operation of such gaming businesses.

The dissent seems to be influenced by the fact that LSI is a "for-profit, multi-million dollar" enterprise and therefore contends that our analysis under each of these factors is mistaken. With regard to the first factor, the

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[6] We note also that an amended Community Corporation Ordinance and restated Articles of Incorporation of LSI, filed after the commencement of this litigation, provide an even closer link between the members of the Community and the management of LSI. *See* Articles of Incorporation of Little Six, Inc. (amended, Feb. 28, 1995).

purpose for which the business entity is organized, the dissent asserts that the factor would favor immunity for LSI if LSI were engaged in activity, such as providing housing or educational services, that directly benefited the tribe. This point ignores the force of *Cabazon*, which found that gaming activities could further tribal economic development and self-determination. *Cabazon*, 480 U.S. at 217-19. The dissent also argues that the tribe is not involved in the day-to-day management of LSI and, therefore, LSI is more a private corporation than an extension of the tribal government. However, control of a corporation need not mean control of business minutiae; the tribe can be enmeshed in the direction and control of the business without being involved in the actual management. Lastly, the dissent asserts that granting sovereign immunity to LSI would be neutral, or possibly detrimental towards the federal goal of preserving tribal sovereignty and cultural heritage. We do not see how being successful in business and immune from suit necessarily undermines these goals. There is simply no way to avoid the fact that LSI is different from other corporations, regardless of how much money it makes – it is integrally related to the Shakopee Mdewakanton Sioux Community, a federally recognized Indian tribe, and is, therefore, different, despite surface similarities to other for-profit enterprises.

A further concern, if this court were to reject LSI's claim of sovereign immunity, is the intrusion by this court into matters of centuries old common law[7] and federal

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[7] See *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812).

policy, without the slightest suggestion from Congress or the United States Supreme Court that sovereign immunity for tribal corporations is now to be abandoned. We are reminded of the importance of the plenary role of Congress in determining the scope and application of the sovereign immunity doctrine in *United States v. Wheeler* where the Supreme Court stated:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

435 U.S. 313, 323 (1978).

Gavle's appeal here is not unlike that of the State of Oklahoma in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505 (1991). In relation to the collection of state tax on the sale of cigarettes to tribal members on tribal land, the state argued that "tribal business activities * * * are now so detached from traditional tribal interests that the tribal sovereignty doctrine no longer makes sense in this context," and that "no purpose is served by insulating tribal business ventures from the authority of the States to administer their laws." *Id.* at 510. The Supreme Court rejected this argument, reaffirming again the unique role of Congress in determining circumstances where the doctrine of sovereign immunity should be modified:

> Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine * * * . These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development * * * . Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

Oklahoma Tax Comm'n, 498 U.S. at 510 (citations omitted). While the time may well come, or even be upon us now, that a tribal owned corporation, operated for profit as is LSI, should as a matter of fairness and equity be subject to the same liabilities as a non-tribally owned corporation, it is not for this court to make that decision in the absence of some change in Congressional policy or direction from the U.S. Supreme Court indicating that under such circumstances elimination of the tribal corporation's sovereign immunity is appropriate.

Thus, we conclude that as a tribal business entity, formed to enhance the well-being of the Community and closely linked to it in governance, LSI has sovereign immunity from suit, unless it has waived that immunity by express and unequivocal action. We address the issue of waiver next.

Waiver

We begin with the basic tenet of Indian law that tribal sovereign immunity may be waived, but such a waiver must be express and unequivocal and may not be implied. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Gavle here argues that the Articles of Incorporation allow LSI to waive any immunity from suit, relying upon the language of section 3.2 providing that

> The Corporation shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Shakopee Mdewakanton Sioux Community or another court of competent jurisdiction;

However,

> to be effective, the Corporation must, by action of the Board of Directors, explicitly consent to be sued in a contract or other commercial document in which the Corporation shall also specify the terms and conditions of such consent.

Articles of Incorporation, *supra*, at § 3.2.

Based on these provisions it is clear that LSI was legally authorized to waive its sovereign immunity defense by "explicit consent," contained in a "contract or other commercial document" and "specifying the terms and conditions of such consent."

Gavle next asserts that these three requirements are met through LSI's registration with the Secretary of State as a foreign corporation, pursuant to Minn. Stat. § 303.01-.25 (1994). LSI's application to do business in Minnesota provides that the corporation irrevocably consents to service of process, as provided by Minn. Stat.

§ 303.13 (1994), and was signed by Allene Ross, vice-chair of LSI.

Thus, the issue before us is whether such a corporate registration and consent to service is the kind of "express and unequivocal" waiver of sovereign immunity that is called for under the Articles of Incorporation and that *Santa Clara Pueblo* and its progeny require. Like the court of appeals, we conclude that it is not. Quite simply, consent to service of process, and thus to personal jurisdiction, cannot be construed as an automatic waiver of an otherwise available affirmative defense. Presumably foreign corporations that register to do business in Minnesota do not understand that they are waiving their right to assert affirmative defenses, based, for example upon a statute of limitations, failure of consideration, accord and satisfaction and the like. *See* Minn. R. Civ. P. 8.03 (1996). Similarly, we conclude that LSI, by agreeing to service of process, cannot be said to have waived the affirmative defense of sovereign immunity.

This conclusion is fully in accord with controlling federal case law. While it is true, as Gavle argues, that no "magic words" are necessary to operate as a waiver of sovereign immunity, *Rosebud Sioux Tribe v. Val-U Const. Co. of South Dakota, Inc.*, 50 F.3d 560, 563 (8th Cir.), *reh'g denied* (Apr. 21, 1995), *cert. denied*, 116 S.Ct. 78 (1995), there are simply no words here, magic or otherwise, that articulate the kind of clear abandonment of this powerful affirmative defense mandated by the Supreme Court. That kind of particularity is found, by contrast, in a tribal council resolution expressly waiving sovereign immunity. *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd*, 455 U.S. 130 (1982).

Furthermore, the New York Court of Appeals, in the face of an even more explicit state statutory provision, has recently held that the St. Regis Mohawk tribe did not waive its sovereign immunity merely by qualifying to do business as a foreign corporation in the state of New York.

> [T]he mere fact that a tribal corporation, by statute, has designated an agent for service of process or is empowered to "sue and be sued" does not automatically subject that corporate entity to any court's jurisdiction where jurisdiction is otherwise lacking. * * * [E]xpress invocation of the power to sue and be sued and submission to a particular forum by official tribal action is required.

Ransom, 86 N.Y.2d at 563, 658 N.E.2d at 995, 635 N.Y.S.2d at 122. We agree with this analysis.

Gavle also argues from cases which find the needed specificity in "sue and be sued clauses" contained in tribal contracts or other business documents. *See, e.g., Fontanelle v. Omaha Tribe of Neb.*, 430 F.2d 143, 147 (8th Cir. 1970). If there were such a provision at issue here, our conclusion might indeed be different. LSI's articles of incorporation do indeed allow for a "consent to be sued," but they require that it be "explicit" and detailed as to "terms and conditions of the consent." We have no "sue or be sued" clause before us nor anything that specifies "terms and conditions of consent" and thus, there is no waiver of immunity based on this provision of the charter.

Finally, we also find inapposite Gavle's reliance on cases standing for the proposition that a foreign corporation that appoints an agent for service under Minn. Stat. § 303.13 necessarily consents to be sued. *See, e.g., Beales v. L.D. Schreiber & Co.*, 56 F. Supp. 814, 815 (D. Minn. 1944) (citing *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939)); *Rykoff-Sexton, Inc. v. American Appraisal Associates, Inc.*, 469 N.W.2d 88, 90 (Minn. 1991). It is enough to note that none of these cases dealt with the issue of a waiver of Indian tribal immunity, for which, as noted above, the Supreme Court has identified specific requirements. Further, at most, they represent the proposition that appointment of an agent may serve as a concession on the issue of personal jurisdiction.

The Supreme Court's holding in *Santa Clara Pueblo* created a high threshold on the issue of a tribe's waiver of its sovereign immunity and manifested strong public policy protective of tribal independence. We cannot conclude that a mere agreement to accept service of process rises to meet that threshold, and therefore, we hold that LSI did not waive its immunity from suit.

We note for the record that the dissent and other state judicial brethren have expressed displeasure that we find that sovereign immunity may extend to a tribal business entity. However, we find no statute or congressional mandate that denies Indian tribes their sovereign status. As recently as 1991, the Supreme Court noted that "[a] doctrine of Indian sovereign immunity was originally enunciated by this Court and has been reaffirmed in a number of cases. Congress has always been at liberty to dispense with such tribal immunity or limit it. * * * Instead, Congress has consistently reiterated its approval of the

immunity doctrine." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Tribe of Oklahoma*, 498 U.S. 505, 510 (1991) (citations omitted).

So, too, do we reiterate and reaffirm that doctrine by our holding today.

Affirmed.

DISSENT

KEITH, Chief Justice (dissenting in part).

I respectfully dissent. While I agree with the majority that state courts have concurrent jurisdiction with tribal courts in lawsuits of this type, I disagree with the majority's conclusion that for-profit, multi-million dollar private tribal businesses like Little Six, Inc. (LSI) may rely upon the same sovereign immunity defense to which the tribe itself is entitled. As the majority frames the issue, the question is whether LSI is a tribal entity "analogous to a governmental agency" which should benefit from the sovereign immunity defense, or whether LSI is in fact a "commercial business enterprise, instituted solely for the purpose of generating profits for its private owner." It seems to me that LSI clearly fits the latter definition. Accordingly, I would reverse the decision of the court of appeals and permit Gavle to pursue her various claims against LSI in state court.

The result of the majority's decision in this case is to grant total immunity from suit to a complex, for-profit corporate entity with hundreds of employees which

transacts business both inside and outside Indian country. By extending the sovereign immunity defense to include LSI, the majority ignores the historical purpose of the sovereign immunity doctrine in this country as applied to Indian tribes, which is to grant special independent sovereign status to Indian tribes and their *governmental* bodies. In no way does LSI conform to the ordinary conception of a non-profit, governmental entity entrusted with promoting the welfare of its citizens: clearly, LSI is first and foremost a *corporation* engaged in a for-profit business venture for the purely financial benefit of its shareholders.

The majority cites several factors which other courts have relied upon to answer the "important, complex and unresolved question" of whether tribal sovereign immunity protects commercial activities. Selecting just three of these factors, the majority then reaches the conclusion that LSI is entitled to sovereign immunity in this case. I disagree. First, the majority cites LSI's own Articles of Incorporation as "evidence" of LSI's intended purpose of "improving the business, financial or general welfare of the Corporation, Members of the Corporation, and the Community." This language, however, could be found in the articles of incorporation of any for-profit corporation and certainly does not suggest that LSI was intended to benefit the Community in the same sense as a housing authority, educational fund, agricultural cooperative or other extension of the tribal government intended solely to promote the tribe's well-being. Instead, it is clear from the trial court record that LSI's primary purpose is to generate profits for its shareholders (*i.e.*, the tribe's members) without any restrictions whatsoever on the use of

the funds from the casino. I do not mean to suggest that generating profits for the tribe's members is an improper or unethical objective, but merely point out that a corporation like LSI should not receive the same protections as tribal businesses whose funds are directed towards general improvements for the community as a whole, such as education, environmental protection, health care or job opportunities.[1]

Second, the majority is persuaded by the fact that LSI's single share of stock is owned by the Community as a whole, and that its Board of Directors must include a majority of Community members. However, this does not change the fact that LSI is a private corporation, registered to transact business in the State of Minnesota like any other private business, and certainly not an extension of the tribal government per se. Furthermore, LSI was not

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[1] *See, e.g., Ransom v. St. Regis Mohawk Educ. & Community Fund, Inc.*, 86 N.Y.2d 553, 658 N.E.2d 989, 635 N.Y.S.2d 116 (N.Y. 1995) (non-profit tribal corporation organized to provide education and health services to tribe enjoyed tribe's sovereign immunity); *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (Ariz. 1971) (tribal agency empowered with management of tribe's timber resources was "subordinate economic organization" and therefore was immune from suit); *S. Unique, Ltd. v. Gila River Pima-Maricopa Indian Community*, 138 Ariz. 378, 674 P.2d 1376 (Ariz. Ct. App. 1983) (agricultural venture created to promote economic welfare of Indian community and whose property was entirely owned by community was "subordinate economic organization" of tribal government and therefore entitled to tribal sovereign immunity).

incorporated under Section 17 of the Indian Reorganization Act, which extends sovereign immunity to corporations formed by tribal governments to further the tribe's economic interests. *See* 25 U.S.C. §§ 476, 477 (1994). The tribal government is not involved in the day-to-day operations of LSI's business ventures, does not select or supervise the board of directors, nor is tribal property threatened by judgments against the corporation. As the court of appeals found, LSI "was created as a separate economic entity, not subject to governmental control, incorporated under tribal law and not merely as an authorized tribal activity." *Gavle v. Little Six, Inc.*, 534 N.W.2d 280, 284 (Minn. App. 1995).

And finally, the majority claims that extending sovereign immunity to LSI will follow federal policy encouraging the tribe's autonomy and general welfare. However, denying sovereign immunity to LSI, a corporation whose primary responsibilities consist of running a casino, would not infringe upon the federal government's laudable goals of cultural preservation, conservation of natural resources owned by the tribe, or promotion of tribal self-government. The assets of the Community would not be jeopardized by court judgments against LSI, and in fact there is a persuasive argument that extending sovereign immunity to corporations like LSI could be potentially detrimental to the tribe's business interests. As the Arizona Supreme Court noted in *Dixon v. Picopa Construction Co.*, 160 Ariz. 251, 259, 772 P.2d 1104, 1112 (Ariz. 1989), "an Indian corporation's successful assertion of immunity, even in a negligence case, may deter persons or entities from entering into contractual relationships

with the Indian corporation or any other Indian corporation. Non-Indians will undoubtedly think long and hard before entering into business relationships with Indian corporations that are immune from suit."

I find substantial similarities between the facts at issue in this case and those considered by the Arizona court in *Dixon*. In that case, the court held that a construction company incorporated by an Indian tribe was not a "subordinate economic organization," and therefore was not entitled to assert the tribe's sovereign immunity defense in a tort action brought by an automobile driver following an off-reservation automobile accident. *Id.*, 772 P.2d at 1108-10 (citing *White Mountain Apache Indian Tribe v. Shelley*, 107 Ariz. 4, 480 P.2d 654 (Ariz. 1971)). Like LSI, the Picopa Construction Company involved in the *Dixon* case had a board of directors separate from the tribal government and with exclusive administrative control of the corporation's day-to-day operations, was instituted as a for-profit business venture with the Community as the sole shareholder, was not organized under Section 17 of the Indian Reorganization Act, and was not intended to carry out the Community's governmental functions. *Id.* at 1107-11. I would follow the Arizona court's reasoning in *Dixon* and *Shelley*, and require that a business incorporated under tribal law show itself to be an extension of the tribal government in order to take advantage of the tribe's sovereign immunity defense. In this case, it is clear that LSI does not meet this test. In conclusion, I believe that Gavle should be permitted to pursue her claims

against LSI in state court because LSI is not an economic organization subordinate to the tribal government.

DISSENT

COYNE, Justice (dissenting).

I dissent. Little Six, Inc., applied for and was granted a certificate of authority to transact business in Minnesota as a foreign corporation in accordance with Chapter 303 of Minnesota Statutes. For more than 50 years before the incorporation of Little Six, Inc., Minnesota has accorded registered foreign corporations the following powers:

> After the issuance of a certificate of authority by the secretary of state and until cancellation or revocation thereof or issuance of a certificate of withdrawal, the corporation shall possess within this state the same rights and privileges that a domestic corporation would possess if organized for the purposes set forth in the articles of incorporation of such foreign corporation pursuant to which its certificate of authority is issued, *and shall be subject to the laws of this state*.

Minn. Stat. § 303.09 (1994) (emphasis added). Gavle complains of violation of the Minnesota Human Rights Act, Minn. Stat. ch. 363 (1994). The requirements of the Minnesota Human Rights Act are applicable to the state and its political subdivisions as well as to private employers, and I can see no earthly reason for permitting a foreign corporation to depart the Shakopee Mdewakanton Sioux

(Dakota) reservation and to violate with impunity the human rights of Minnesota citizens while transacting business in Minnesota.

That Indian tribes retain a unique sovereignty is beyond dispute. When the members of the tribe reside on the reservation and confine their commercial activities to the reservation, the State of Minnesota may not and does not subject the tribe's members to the state's tax laws. *Brun v. Commissioner of Revenue*, 549 N.W.2d 91 (Minn. 1996). When, however, the sovereign becomes a merchant, his license to carry on his commercial activity on foreign soil and to carry on his trade with the inhabitants of the foreign state is expressly subject to the laws of the licensor. Little Six, Inc., like any other foreign corporation, must be deemed to have accepted the certificate of authority to transact business in Minnesota subject to its express limitations.

As Chief Justice John Marshall put it in 1812, although the "military force which supports the sovereign power and maintains the dignity and independence of a nation" is not subject to the jurisdiction of another sovereign nation whose borders the military force crosses under license to do so, "[a] prince, by acquiring private property in a foreign country, * * * may be considered as so far laying down the prince, and assuming the character of a private individual," that he subjects the property to the territorial jurisdiction. *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116, 145 (1812).

In modern parlance that statement means that if a commercial entity enters a commercial arena outside its own territory pursuant to a Minnesota certificate of

authority to transact business as a foreign corporation, the foreign corporation is subject not merely to Minnesota's jurisdiction, but it is subject to the laws of Minnesota and the defense of sovereign immunity is, at the very least, of no more avail to the foreign corporation than it is to the state and its political subdivisions.

Therefore, I would reverse the lower courts and remand for vacation of the summary judgment in favor of Little Six, Inc.

APPENDIX B

STATE OF MINNESOTA
IN COURT OF APPEALS

CO-95-133

Scott County
District Court File No. 9412423

Crippen, Judge

Jill Gavle,

Appellant,

vs.

Little Six, Inc., a foreign corporation d/b/a Mystic Lake Casino, et al.,

Respondents.

Ronald H. Usem
Craig D. Greenberg
Huffman, Usem, Saboe, Crawford & Greenberg, P.A.
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Filed: July 11, 1995
Office of Appellate Courts

SYLLABUS

1. An Indian tribal business corporation has sovereign immunity on a complaint alleging tortious conduct, including conduct off the tribe's reservation. Our declaration to withhold this application of tribal sovereign immunity, although persuasively advanced as a matter of public policy, would require lawmaking without guiding authority from the United States Congress, the United States Supreme Court or the Minnesota Supreme Court.

2. A tribal corporation does not waive sovereign immunity by registering in a Minnesota as a foreign corporation, nor by adoption of a corporate charter stating that it must consent to be sued.

Affirmed.

Considered by Crippen, Presiding Judge, Toussaint, Chief Judge, and Kalitowski, Judge.

OPINION

CRIPPEN, Judge

Appellant Jill Gavle challenges the trial court's application of sovereign immunity to an Indian tribal business corporation alleged to have engaged in tortious conduct on and off the reservation. We affirm, finding no warrant for this court to refuse to apply sovereign immunity, and finding that the respondent tribal business corporation did not expressely [sic] waive its immunity.

FACTS

Appellant alleges sexual harassment, pregnancy and race discrimination, civil rights violations, and various related torts arising from her employment with respondent Little Six, Inc., and the conduct of three Little Six officers. The alleged illegal acts occurred both on the Shakopee Mdewakanton Sioux Community reservation and at Little Six's corporate headquarters in Shakopee, off the reservation. Appellant is also suing the corporate officers individually, but these claims are not at issue on this appeal.

Appellant obtained employment with respondent Little Six, a business corporation formed by tribal ordinance of the Shakopee Mdewakanton Sioux Community. Little Six is registered as a foreign corporation in Minnesota. The corporation issued one share of stock when it was formed in 1991 and that share is owned by the Shakopee Mdewakanton Sioux Community as a whole. Each voting member of the community is entitled to one vote on corporate matters placed before the community for a vote.

Little Six's articles of incorporation, developed under authority of the community's business ordinances, provide that the purpose of the corporation is to "improve the business, financial or general welfare of the Corporation, Members of the Corporation, and the Community." The articles provide that the corporation has the same sovereign immunity from suit as the community except for claims by the community or members of the corporation against the corporation. But the corporation reserves the "power to sue and * * * to consent to be sued"

provided that a "contract or other commercial document * * * [specifies] the terms and conditions of such consent." And "consent to suit by the Corporation * * * [may not] be deemed a waiver of any of the rights, privileges and immunities of the Community."

The trial court granted summary judgment for Little Six on grounds that the corporation was immune from suit and, because Little Six had not consented to be sued, the trial court held that it had no subject matter or personal jurisdiction. The trial court held that registering with the secretary of state did not amount to a waiver of sovereign immunity.

ISSUES

1. Does sovereign immunity apply to tribal business corporation activity on and off the reservation?

2. Has Little Six expressly waived its sovereign immunity?

ANALYSIS

The trial court's summary judgment was granted as a matter of law on undisputed facts and is reviewed without deference to the trial court's determination. *Hubred v. Control Data Corp.*, 442 N.W.2d 308, 310 (Minn. 1989).

1. *Sovereign immunity*

The trial court had subject matter and personal jurisdiction over Little Six, a tribal business corporation, but sovereign immunity is a separate inquiry. *Duluth Lumber*

& Plywood Co. v. Delta Dev., Inc., 281 N.W.2d 377, 383 (Minn. 1979).[1]

Tribal sovereignty has been recognized in the law since 1832. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *See Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 172-73, 97 S. Ct. 2616, 2621 (1977) (modern application). "There is no question that Indian tribes are generally immune from suit." *Duluth Lumber*, 281 N.W.2d at 383. Sovereign immunity, in part, protects the remnant of Indian resources from judgments that would deplete those assets. *See Cogo v. Central Council of Tlingit & Haida Indians*, 465 F.Supp. 1286, 1288 (D. Alaska 1979); *Atkinson v. Haldane*, 569 P.2d 151, 174 (Alaska 1977). But the scope of the immunity is not absolute, and Congress with its plenary powers has unlimited authority to waive or limit a tribe's sovereign immunity. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677 (1978).

Tribal Sovereignty of the Shakopee Mdewakanton Sioux Community is further evidenced by its organization under the Indian Reorganization Act of 1934, 25 U.S.C.A. § 476 (Supp. 1995) (hereinafter Section 16 tribal government corporation). The purpose of the Act is "to rehabilitate the Indian's economic life and to give [Indians] a chance to develop the initiative destroyed by a

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[1] The trial court had personal jurisdiction over Little Six by virtue of its registration as a foreign corporation in Minnesota and appointment of an agent for service of process. Minn. Stat. § 303.13, subd. 1 (1992); *Rykoff - Sexton, Inc. v. American Appraisal Assoc., Inc.*, 469 N.W.2d 88, 90 (Minn. 1991). It also had subject matter jurisdiction over the claims stated against Little Six. *Duluth Lumber*, 281 N.W.2d at 381.

century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152, 93 S. Ct. 1267, 1272 (1973) (citation omitted). The Indian Reorganization Act provides that a tribal government may incorporate under Section 16 to further economic interests and to be protected by sovereign immunity. *Parker Drilling Co. v. Metlakatla Indian Community*, 451 F. Supp. 1127, 1131 (D. Alaska 1978).

2. *Application of Sovereign Immunity to Tribal Corporation*

Courts have applied sovereign immunity to both tribal governments and their business activities. *Maryland Casualty Co. v. Citizens Nat'l Bank*, 361 F.2d 517, 521 (5th Cir. 1966), *cert. denied*, 385 U.S. 918 (1966); *White Mountain Apache Indian Tribe v. Shelley*, 480 P.2d 654, 657 (Ariz. 1971); *Morgan v. Colorado River Indian Tribe*, 443 P.2d 421, 424 (Ariz. 1968); *North Sea Pros. Ltd. v. Clipper Seafoods Corp.*, 595 P.2d 938, 941-42 (Wash. 1979). But this broad application of sovereign immunity must be examined in light of the Indian Reorganization Act, which separates tribal enterprises into tribal governmental and tribal business corporations.

Congressional intent to treat some tribal business corporations as entities distinct from the tribe itself is manifested in the Indian Reorganization Act, 25 U.S.C. § 477 (Supp. 1990) (hereinafter Section 17 tribal business corporation). Section 17 is the counterpart to Section 16, which governs tribal government corporations. *Parker Drilling Co.*, 451 F.Supp. at 1131; *Atkinson*, 569 P.2d at 174-75. Section 17 provides for the formation of tribal business corporations which may further the economic

interests of the community. *Atkinson*, 569 P.2d at 174. Congress enacted Section 17 out of concern that tribal government corporations would be at an economic disadvantage because banks and other businesses would be reluctant to engage in transactions with entities that enjoy sovereign immunity. *Parker Drilling Co.*, 451 F. Supp. at 1131; *Atkinson*, 569 P.2d at 172, 174; *see also*, William V. Vetter, *Doing Business with Indians and the Three "s'es"*, 36 Ariz. L. Rev. 169, 175 (1994) (hereinafter Vetter).

The model articles of incorporation for Section 17 tribal business corporations contain a "sue and be sued" clause that constitutes a waiver of sovereign immunity and subjects the tribal business corporation, but not the tribe, to suit "consistent with the [Indian Reorganization Act's] purpose." Vetter, 36 Ariz. L. Rev. at 175. In this way tribal business corporation property is risked, leaving the tribal property safe from judgments. *Atkinson*, 569 P.2d at 175. But in its choice of language for Section 17, Congress does not require a "sue and be sued" clause or that all tribal businesses incorporate under its terms. Thus, although the Shakopee Mdewakanton Sioux Community incorporated under section 16 of the Indian Reorganization Act, Little Six was not incorporated under either Section 16 or 17, but under the tribe's business ordinances.

Against this history of the common law and the Indian Reorganization Act, application of sovereign immunity to tribal business corporations has begun to further erode because "tribal activities conducted outside the reservation present different considerations." *Mescalero Apache Tribe*, 411 U.S. at 148, 93 S. Ct. at 1270. "Absent express federal law to the contrary, Indians

going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Id.* at 148-49, 93 S. Ct. at 1270 (citations omitted). Little Six cites no "express federal law" that protects its off-reservation activities.

In *Mescalero,* dealing with the tribe's off-reservation ski resort operation, the U.S. Supreme Court refused to apply sovereign immunity when the state asserted its regulatory power to tax the enterprise. *Id.* at 147-48, 93 S. Ct. at 1270. The U.S. Supreme Court recently restated this limited recognition of tribal sovereign immunity in another taxation case. In *Oklahoma Tax Comm'n v. Chickasaw Nation,* 63 U.S.L.W. 4557, 4594 (U.S. June 14, 1995), the Court held that "the Tribe gains no support from the rule that Indians and Indian tribes are generally immune from state taxation as this principle does not operate outside Indian country." *Id.* at 4598 (citations omitted). Furthermore, in construing treaty language that is similar to Public Law 280, *infra,* by virtue of its application to persons and to tribal property, the Court held: "We comprehend this * * * language to provide for the Tribe's sovereignty within Indian country. We do not read the [language] as conferring super-sovereign authority to interfere with another jurisdiction's sovereign right[s]." *Id.* But the *Mescalero* and *Chickasaw Nation* opinions, while addressing the state's regulatory or taxing authority, provide no direction on the application of sovereign immunity to a tribal business corporation in the context of civil tort litigation in state courts.

In *Dixon v. Picopa Constr. Co.,* 772 P.2d 1104, 1111-12 (Ariz. 1989), the Arizona Supreme Court, the only state

court so holding, found that a tribal corporation with no government functions, created by tribal laws as a separate entity, and with liabilities not borne by the tribe, could not assert the tribe's immunity for off-reservation torts. The *Dixon* court distinguished between treatment of corporations that are subordinate economic organizations of the tribal government, entitled to sovereign immunity, and those that are for-profit businesses lacking government control. *Id.* at 1108-11. This distinction corresponds to congressional intent expressed in the Indian Reorganization Act.

Here, Little Six claims it is an arm of the tribal government, but this claim has no merit. Neither the form nor the substance of the Shakopee Mdewakanton Sioux Community business ordinances or Little Six's articles of incorporation support this conclusion. *See Mescalero,* 411 U.S. at 157 n.13, 93 S. Ct. at 1275 n.13 ("question of * * * immunity cannot be made to turn on the particular form in which the Tribe chooses to conduct its business"). These documents show that Little Six was not created as a tribal government corporation under Section 16. It was created as a separate economic entity, not subject to governmental control, incorporated under tribal law and not merely as an authorized tribal activity. Little Six's board of directors is permitted to act outside the control of tribal officials, conduct business off the reservation, and its declared purpose does not include governmental activities. It has broad corporate powers and is organized as a for-profit entity. Tribal property is protected from judgments entered against the corporation. See *Dixon,* 772 P.2d at 1109-11 (factors that make tribal corporation separate and distinct organization from tribal government);

Vetter, 36 Ariz. L. Rev. at 178. Applying the reasoning of the Arizona court in *Dixon*, Little Six is not entitled to assert sovereign immunity, because it is a separate economic activity, and not subordinate to the tribal government.

Another court has reached a similar conclusion on claims arising from acts that occurred off the reservation but where the alleged cause of action was for breach of contract. *Padilla v. Pueblo of Acoma*, 754 P.2d 845, 850 (N.M. 1988), *cert. denied*, 490 U.S. 1029 (1989) (unincorporated tribal business, registered to do business in the state). The *Padilla* court held that because there was no law limiting its jurisdiction and because New Mexico has a policy allowing suit against the state for breach of contract, comity required that the tribe should be similarly bound for off-reservation activity. *Id.* at 850-51.

The Ninth Federal Circuit rejected the reasoning of *Padilla*, holding that congressional silence regarding off-reservation commercial activities is "compelling, if not controlling * * * [s]ince only Congress can limit the scope of tribal immunity and it has not done so." *In re Greene*, 980 F.2d 590, 594 (9th Cir. 1992), *cert. denied*, ___ U.S. ___ (1994). The court further criticized the *Padilla* court for its reliance on comity, urging that federal tribal immunity law leads to the conclusion that tribal sovereign immunity does not stop at the reservation boundaries. *Id.* at 594-95. But the *Greene* court discussed the sovereign immunity of an Indian tribe and its subordinate tribal economic activities, not an independent tribal business corporation such as exists here and existed in *Dixon*.

The Minnesota Supreme Court has held that an Indian organization incorporated under a tribe's business ordinance is a separate legal entity that could be sued on a breach of contract claim arising off the reservation. *Duluth Lumber,* 281 N.W.2d at 384. But in that case sovereign immunity had been waived by operation of a "sue and be sued clause" in the contract.

Appellant argues that because Minnesota is a "Public Law 280" state, this court has jurisdiction over civil causes of action to which Indians are parties, and "those civil laws of such State * * * that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State." 28 U.S.C. § 1360 (1988).

Congress enacted Public Law 280 out of concern for lawlessness on some reservations, inadequate tribal law enforcement, and the state court's lack of jurisdiction over Indians. *Bryan v. Itasca County,* 426 U.S. 373, 379, 96 S. Ct. 2102, 2106 (1976). Public Law 280 waives sovereign immunity of Indians in that it gives Minnesota courts limited civil jurisdiction over actions "between Indians or to which Indians are parties" and "which arise in the areas of Indian Country." 28 U.S.C. § 1360(a).[2] Because Little Six is a separate legal and economic enterprise from the tribal government, appellant's argument has some

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[2] We note that "there is notably absent [from P.L. 280] any conferral of state jurisdiction over the tribes themselves." *Bryan,* 426 U.S. at 389, 96 S. Ct. at 2111; *see Atkinson,* 569 P.2d at 167 (clear expression of waiver of sovereign immunity absent from P.L. 280). Furthermore, P.L. 280 does not apply to the Red Lake Reservation. 28 U.S.C. § 1360(a).

merit. But P.L. 280 applies to Indians, not Indian tribes, *Bryan*, 426 U.S. at 388-89, 96 S. Ct. at 2111, and its is not clear concerning its application to tribal business corporations.

Ambiguities must be resolved in favor of the tribe, and the failure of Public Law 280 to address the status of tribal business corporations must be narrowly construed. *Bryan*, 426 U.S. at 81, 96 S. Ct. at 2107 ("omission has significance in the application of the canons of construction applicable to statutes affecting Indian immunities"); *Atkinson*, 569 P.2d at 166. Furthermore, because the Indian Reorganization Act's model articles of incorporation anticipated that a tribal corporation would be subject to suit by including a "sue and be sued" clause, this implies that sovereign immunity applies in the absence of such a clause. Here, there is no "sue and be sued" clause.

In sum, appellant's contentions on appeal find support only in an Arizona State Court decision, and to a lesser extent in New Mexico. And Congress has left the issue unresolved. The Indian Reorganization Act was intended to provide a waiver of sovereign immunity to tribal business corporations, but only when accomplished by articles of incorporation. And Public Law 280 has unclear ramifications for tribal business corporations. Our declaration that a tribal business corporation has no sovereign immunity for off-reservation activities is unwarranted in the absence of direction from Congress, the Supreme Court of the United States, or the Minnesota Supreme Court.

Although appellant argues persuasively that a tribal business corporation conducting business off the reservation should be held legally accountable for its actions, because our supreme court has not spoken, and "[b]ecause of the supremacy of federal law, we are bound to recognize the doctrine of tribal sovereign immunity, even if we were to find valid public policy reasons to hold it inapplicable in this case." *Atkinson* 569 P.2d at 163.

3. *Sovereign immunity must be expressly waived*

Because Little Six is entitled to immunity on the claims stated in this case, we must next determine if Little Six waived that immunity. Tribes, like Congress, may waive sovereign immunity to advance economic interests that may be thwarted if third parties perceive the tribes to be legally unaccountable for their business transactions. *United States v. Oregon*, 657 F.2d 1009, 1013-14 (9th Cir. 1981). Such a waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58, 98 S. Ct. at 1677 (quoting *United States v. Testan*, 424 U.S. 392, 399, 96 S. Ct. 948, 953 (1976)). Consent may not be inferred, *see Maynard v. Narragansett Indian Tribe*, 984 F.2d 14, 16 (1st Cir. 1993), even if similar acts would constitute an implied waiver by a non-Indian government. *American Indian Agric. Credit Consortium v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1377 (8th Cir. 1985). "Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe." *Puyallup Tribe*, 433 U.S. at 172, 97 S. Ct. at 2621.

Minnesota courts find a waiver of immunity for Indian tribal businesses where there exists express language such as that contained in a "sue and be sued" clause. *Duluth Lumber*, 281 N.W.2d at 384; *Dacotah Prop. v. Prairie Island Indian Community*, 520 N.W.2d 167, 171 (Minn. App. 1994), *pet. for rev. granted*, (Minn. Sept. 28, 1994), *appeal dismissed* (Minn. Feb. 7, 1995). But, no such clause is present in Little Six's articles of incorporation, nor in the Shakopee Mdewakanton Sioux Community ordinances. Rather, the articles of incorporation clearly state that Little Six must consent to be sued by contract or by another commercial document which specifies the terms and conditions of the consent. Here, no such express consent to suit exists.

Appellant argues that by registering as a foreign corporation and consenting to service of process, Little Six has waived immunity. But consent to service does not amount to a waiver of sovereign immunity. The Ninth Federal Circuit heard and rejected this argument in *Snow v. Oinault Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983), *cert. den.*, 467 U.S. 1214 (1984). There, the court held that consent to service of process does not waive sovereign immunity because it would amount to a waiver of tribal immunity by individual tribal officers who agree to accept service of process, which is not possible in the law. *Id.* (quoting *United States v. United States Fidelity Co.*, 309 U.S. 506, 513, 60 S. Ct. 653, 656 (1940)). Other courts, too, have held that incorporating under the laws of a state does not amount to an express waiver of sovereign immunity. *Haile v. Saunooke*, 246 F.2d 293, 297-98 (4th Cir. 1957), *cert. denied*, 355 U.S. 893 (1957). And a settlement agreement subjecting land to the laws and jurisdiction of

the state does not result in an inferential waiver of sovereign immunity. *Maynard,* 984 F.2d at 16.

4. *Equal Protection under the Indian Civil Rights Act*

Appellant argues in passing that she is denied equal protection under the Indian Civil Rights Act of 1968, 25 U.S.C. § 1302(8) because Little Six allows suit against it by the tribe and tribal members but not others. "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo,* 436 U.S. at 56, 98 S. Ct. at 1675-76. Congress passed the 1968 law to impose certain restrictions on the tribes and provide protection similar to the Bill of Rights and Fourteenth Amendment. *Id.* at 57, 98 S. Ct. at 1676. But Congress has never authorized civil actions to be brought in state or federal courts for relief under the 1968 Act by waiving the tribe's sovereign immunity. *Id.* at 59, 98 S. Ct. at 1677. Instead, the 1968 law only provides for habeas corpus relief to test the validity of tribal action. *Id.* at 58, 98 S. Ct. at 1677. Appellant must seek relief under the Act in the tribal court. *Id.* at 65, 98 S. Ct. at 1680-81; *Snow,* 709 F.2d at 1323.

DECISION

The decision of the trial court to grant summary judgment in favor of respondent Little Six, Inc. is compelled under the existing state of the law on sovereign

immunity. Little Six has not expressly waived its sovereign immunity.

Affirmed.

/s/ J. Crippen
June 28, 1995

APPENDIX C

STATE OF MINNESOTA — DISTRICT COURT
COUNTY OF SCOTT — FIRST JUDICIAL DISTRICT

Jill Gavle,

Plaintiff,

vs.

Little Six, Inc, a foreign corporation d/b/a Mystic Lake Casino, Leonard Prescott, Allene Ross and William Johnson, individually,

Defendants.

Court File
No. 94-12423

ORDER

(Filed
Dec. 16, 1994)

The above entitled matter came on for hearing before the undersigned Judge of District Court on the 15th day of December, 1994, at the Scott County Courthouse.

Craig D. Greenberg, Esq., appeared on behalf of plaintiff; Joseph Plumer, Esq., appeared on behalf of defendant Little Six, Inc.; Douglas Kelley, Esq., appeared on behalf of defendant Leonard Prescott; B. Todd Jones, Esq., appeared on behalf of defendant Allene Ross; and Larry Leventhal, Esq., appeared on behalf of defendant William Johnson.

Defendants Little Six, Inc. and Allene Ross moved for dismissal of the lawsuit based upon lack of personal and subject matter jurisdiction, and failure to state a claim upon which relief can be granted.

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED AS FOLLOWS:

1. That the motion to dismiss of defendant Little Six, Inc. is granted.

2. That the motion to dismiss of defendant Allene Ross is denied.

3. That the attached memorandum is incorporated by reference herein.

Dated: December 16, 1994.

BY THE COURT:

/s/ Thomas R. Howe
Thomas R. Howe
Judge of District Court

MEMORANDUM

Plaintiff was employed by Little Six, Inc. as a security guard. Plaintiff alleges that during the time she was employed she was subjected to unlawful sexual harassment, pregnancy discrimination, race discrimination, defamation, assault and battery, intentional infliction of emotional distress, negligent infliction of emotional distress, tortious interference with the employment relationship, violation of Minnesota and federal leave acts, violation of 42 U.S.C. Sec. 1981, and violation of the Indian Civil Rights Act under 25 U.S.C. 1302(8).

Defendant Little Six, Inc. argues that the Shakopee Mdewakanton Dakota community is a federally recognized Indian tribe and is therefore immune from suit by virtue of its status as a sovereign nation. Defendant Little Six, Inc. is an entity of that tribe. Tribal sovereign immunity shields defendant Little Six, Inc. from suit unless there is a clear and unequivocal waiver of that immunity. It contends that no express waiver of sovereign immunity has been made.

Plaintiff contends that since Little Six, Inc. registered as a foreign corporation with the Secretary of State, it has waived its claim to sovereign immunity. In addition, the Articles of Incorporation of defendant Little Six, Inc. contain a "consent to sue and be sued" clause, thereby submitting to the jurisdiction of this court.

Articles 3.1 and 3.2 of the Articles of Incorporation state in relevant part:

> 3.1 Sovereign Immunity of Corporation. The Shakopee Mdewakanton Sioux Community confers on the Corporation all of the Community's rights, privileges and immunities concerning federal, state and local taxes, regulation and jurisdiction, and sovereign immunity from suit, to the same extent that the Community would have such rights, privileges, and immunities if it engaged in activities undertaken by the Corporation. Such immunity shall not extend to actions against the Corporation by the Community or Members of the Corporation.
>
> 3.2 Consent to Sue and Be Sued Required. The corporation shall have the power to sue and is authorized to consent to be sued in the Judicial Court of the Shakopee Mdewakanton Sioux

> Community or another court of competent jurisdiction; provided, however, that any recovery against the Corporation shall be limited to the assets of the Corporation delineated at Article 6 of these Articles of Incorporation, and that to be effective, the Corporation must, by action of the Board of Directors, explicitly consent to be sued in a contract or other commercial document in which the Corporation shall also specify the terms and conditions of such consent.

Defendant states that the language of the Articles of Incorporation are clear and unequivocal that Little Six, Inc. is not subject to suit unless it consents to such suit. The Board of Directors must explicitly consent to be sued in a contract or other commercial document that specifies the terms and condition of such consent. Since the Board has not specifically consented to suit in this Court, the Court has no jurisdiction over Little Six, Inc.

The Articles of Incorporation are clear and definite. Without a specific consent to be sued in this case by the Board of Directors, this Court has no jurisdiction. Simply registering with the Secretary of State for the purposes of service of process is not consistent with the well settled law that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58 (1978) (citations omitted). Consenting to service of process is not a waiver of sovereign immunity. *Snow v. Quinault Indian Nation,* 709 F.2d 1319 (9th Cir. 1983) *cert. denied,* 467 U.S. 1214 (1984). Consequently, the motion to dismiss made by defendant Little Six, Inc. is granted.

Defendant Allene Ross claims that as a corporate officer of Little Six, Inc., she is also immune from suit. Defendant Ross also argues that the state court lacks subject matter jurisdiction in cases arising out of conduct between Indians and non-Indians on Indian Reservations.

Tribal immunity extends to tribal officials acting in their representative capacity and within the scope of their authority. *Snow v. Quinault Indian Nation*, 709 F.2d 1319 (1983) *citing United States v. Oregon*, 557 F.2d 1009, 1012, n. 8 (9th Cir. 1981); *Hegner v. Dietze*, Minnesota Court of Appeals File No. CX-94-839 (Filed December 13, 1994). Defendant Allene Ross' immunity from suit will depend on whether or not she was acting in her representative capacity and within the scope of her authority as to plaintiff's allegations. This is a fact issue which must be determined at trial.

Under 28 U.S.C.A. Sec. 1360(a), Minnesota shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country . . . to the same extent that such State has jurisdiction over other civil causes of action. Subject matter jurisdiction is primary and an absolute stricture on the court. *In Re Prairie Island Dakota Sioux*, 21 F.3d 302, 304-5 (8th Cir. 1994) citing *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979). Sovereign immunity operates essentially as a party's possible defense to a cause of action. *In Re Prairie Island Dakota Sioux*, 21 F.2d at 304 citing *Weeks Const., Inc. v. Oglala Sioux Housing Auth.*, 797 F.2d 668,

671-72 (8th Cir. 1986). Properly, this Court has subject matter jurisdiction. Therefore, defendant Ross' motion to dismiss is denied.

/s/ TRH
T.R.H.

APPENDIX D

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF SCOTT FIRST JUDICIAL DISTRICT

Jill Gavle,

Plaintiff,

vs.

Little Six, Inc., a foreign corporation d/b/a Mystic Lake Casino, Leonard Prescott, Allene Ross and William Johnson, individually,

Defendants.

CASE TYPE: Employment, Other Civil

Court File No. 94-12423

AFFIDAVIT OF CRAIG D. GREENBERG

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

Craig D. Greenberg, being first duly sworn on oath, state as follows:

1. That I am an attorney for Plaintiff in the above-referenced matter;

2. That I am licensed to practice law in the State of Minnesota, with offices at 1000 Water Park Place, 5101 Olson Memorial Highway, Minneapolis, MN 55422;

3. That attached hereto and incorporated herein as Exhibit A is a true and correct copy of the Application of Foreign Corporation for a Certificate of Authority to

Transact Business in Minnesota executed by Little Six, Inc. dated April 23, 1991, on file with the Minnesota Secretary of State's Office;

4. That attached hereto and incorporated herein as Exhibit B is a true and correct copy of the Certificate of Authority to Transact Business in the State of Minnesota dated April 23, 1991 conferred upon Little Six, Inc. by the State of Minnesota, currently on file with the Minnesota Secretary of State; and

5. That attached hereto and incorporated herein as Exhibit C is a true and correct copy of the Notice of Change of Registered Office executed by Little Six, Inc. dated June 29, 1992 and filed with the Minnesota Secretary of State.

Further your Affiant saith not.

Dated: December 6, 1994

/s/ Craig D. Greenberg
Craig D. Greenberg

Subscribed and sworn to before me
this 6th day of December, 1994.

/s/ Diane M. Brustad
Notary Public

[SEAL] DIANE M. BRUSTAD
NOTARY PUBLIC MINNESOTA
ANOKA COUNTY
My Commission Expires
Mar. 4, 1997

EXHIBIT A

State of Minnesota
Office of the Secretary of State

[SEAL]

APPLICATION OF FOREIGN CORPORATION FOR A CERTIFICATE OF AUTHORITY TO TRANSACT BUSINESS IN MINNESOTA
180 State Office Building, St. Paul, MN 55155

0056218

Please send a certificate of good standing (sometimes called a certificate of status) for this corporation signed by the filing officer of the state under the laws of which the corporation is organized.

1. The name of this corporation, which is registering in compliance with Section 303.06 of the Minnesota Foreign Corporation Act, is:

   Legal Name of Corporation
   Little Six, Inc.
   Note: To determine whether this name is available, call (612) 296-2803.

2. The alternative name in Minnesota (if applicable) from item 5 is:

   Name Used in Minnesota (if Different)

3. The state or country under the laws of which the corporation is incorporated is:

   Governed Under the Laws of the State of Community of
   Shakopee Mdewakanton Sioux

4. The address of its proposed registered office in the State of Minnesota is: (see note below)*

Address of the Corporate Registered Agent in Minnesota (Number, Street, City, State, Zip Code)

2330 Sioux Trail N.W., Prior Lake, Minnesota 55372

and the name of its registered agent (who must be located at that address) is:

Name of the Corporate Registered Agent in Minnesota

Leonard Prescott

*Note: If the address listed for item 4 is not the location where the registered agent can be found, change it to such a location. This is vitally important.

The corporation irrevocably consents to service of process on it as provided by Minnesota Statutes 303.13 or any amendment thereof or successor thereto.

I certify that I am authorized to execute this application and I further certify that I understand that by signing this application, I am subject to the penalties of perjury as set forth in section 609.48 as if I had signed this application under oath.

/s/ Allene K. Ross
(President, Vice-Chair, Secretary or Assistant Secretary)

SC-00191-02
Filing Number:

Filing Stamp: 0056218
STATE OF MINNESOTA
DEPARTMENT OF STATE

FILED
APR 23, 1991

Joan Anderson Growe
Secretary of State

56218

State of Minnesota

SECRETARY OF STATE

Certificate of Authority to Transact Business

I, Joan Anderson Growe, Secretary of State of Minnesota, do certify that: The following corporation has duly complied with the relevant provisions of Minnesota Statutes, Chapter 303, and is authorized to do business in Minnesota on and after this date with all the powers, rights and privileges, and subject to the limitations, duties and restrictions, set forth in that chapter.

Name of Corporation in Minnesota:

Little Six, Inc.

Name of Corporation in State of Incorporation:

Little Six, Inc.

Corporate Charter Number: 56218

State of Incorporation: XX

Registered Office in Minnesota:
2330 Sioux Trl NW
Prior Lake MN 55372

Name of Registered Agent: Leonard Prescott

This certificate has been issued on 04/23/1991.

Joan Anderson Growe
Secretary of State.

BEST AVAILABLE COPY

EXHIBIT C

[SEAL]

State of Minnesota
Office of the Secretary of State

Notice of Change of
Registered Office – Registered Agent or Both
by

Name of Corporation
Little Six, Inc.

Pursuant to Minnesota Statutes, Section 302A, 123, 303.10, 317.19, 317A.123 or 308A.025 the undersigned hereby certifies that the Board of Directors of the above named Corporation has resolved to change the corporation's registered office and/or agent to:

Agent's Name
If you do not wish to designate an agent, you must list "NONE" in this box. DO NOT LIST THE CORPORATE NAME

Leonard Prescott

Address (No. & Street)
(You may not list a P.O. Box, but you may list a rural route and box number)

2400 Mystic Lake Blvd.

City	**County**		**Zip**
Prior Lake	Scott	MN	55372

Mailing Address
(If different than address above – P.O. Box is acceptable)

City **County** **Zip**
MN

The new address may not be a post office box. It must be a street address, pursuant to Minnesota Statutes, Section 302A.011, Subd. 3., 303.02, Subd. 5, 317.02 Subd. 13., 317A.01 Subd. 2.

This change is effective on the day it is filed with the Secretary of State, unless you indicate another date, no later than 30 days after filing with the Secretary of State, in this box:

July 1, 1992

I certify that I am authorized to execute this certificate and I further certify that I understand that by signing this certificate I am subject to the penalties of perjury as set forth in section 609.48 as if I had signed this certificate under oath.

Name of Officer or Other Authorized Agent of Corporation
LEONARD L. PRESCOTT
(Please Print)

Signature
/s/ Leonard L. Prescott

Date
June 29, 1992

Title or Office
Chairman

Do not write below this line. For Secretary of State's use only.

Receipt Number
751814

Filing Fee: $35.00

Return to:
Business Services
Division
Office of the Secretary
of State
180 State Office
Building
St. Paul, MN 55155
(612) 296-2803

Make checks payable to:
Secretary of State

File Data D.A.R.
STATE OF MINNESOTA
DEPARTMENT OF STATE

FILED

JUL 06 1992

Joan Anderson Growe

Secretary of State

APPENDIX E

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF SCOTT FIRST JUDICIAL DISTRICT

Jill Gavle,

Plaintiff,

vs.

Little Six, Inc., a foreign corporation d/b/a Mystic Lake Casino, Leonard Prescott, Allene Ross and William Johnson, individually,

Defendants.

CASE TYPE:
Employment Other Civil

Court File No. 94-12423

AFFIDAVIT OF JILL GAVLE

STATE OF MINNESOTA)
) ss
COUNTY OF HENNEPIN)

I, Jill Gavle, being first duly sworn on oath, state as follows:

1. That I am the Plaintiff in the above-referenced matter;

2. That I currently reside in the State of Minnesota;

3. That from March, 1992 and through June, 1993 I worked as a Security Officer for Little Six, Inc.;

4. That during March, 1992, I saw a help wanted advertisement in the Minneapolis Star Tribune for

employment with Little Six, Inc. and Mystic Lake Casino. The advertisement said that security guard job opportunities were available for students and directed interested persons to go to the Little Six, Inc. Human Resources Department at the Canterbury Inn, Shakopee, Minnesota. A copy of one of these advertisements is attached hereto as Exhibit A. Other Little Six, Inc. help wanted advertisements are attached hereto as Exhibit B;

5. That when I applied for a permanent position with Little Six, Inc., I was directed to the Human Resources Department at Little Six, Inc., which offices were located at 1244 Canterbury Road, Shakopee, MN 55379, in the building known as the "Canterbury Inn" (the "Corporate Offices"). The Corporate Offices were located outside the boundaries of the Shakopee Mdewakanton Sioux Reservation (the "Reservation");

6. That after I was hired by Little Six, Inc., I was directed to complete all new employee paperwork and pick up my uniforms at the Canterbury Inn;

7. That I was at the Corporate Offices on numerous occasions for employee functions, including training seminars and the employee reorientation for the Mystic Lake grand opening;

8. That as part of my regular Little Six, Inc., job duties, I was assigned to security patrol duty at the Canterbury Inn and was stationed at the Corporate Offices overnight;

9. That I was scheduled by Little Six, Inc., to work at the Canterbury Inn on the average of at least one night per week from March, 1992 through August, 1992;

10. That between March, 1992 and August, 1992, I was assigned to the Little Six, Inc., mobile patrol unit approximately six times. As part of its scheduled route, the mobile unit traveled to off-Reservation sites, including the Canterbury Inn, Canterbury Inn parking lot, Canterbury Downs Race Track parking lot, Little Six Uniform Office connected to Brook's Gas Station in Shakopee, and the Valleyfair Amusement Park parking lot (as a turn-around point);

11. That during all times that I worked for Little Six, Inc., all on-duty employees were required to park their vehicles at the Canterbury Downs Race Track parking lot located off the Reservation;

12. That during the Summer of 1992, I attended an official Little Six, Inc., function for all employees at the Valleyfair Amusement Park located off the Reservation in Shakopee, Minnesota;

13. That during 1992, 1993 and 1994, I have seen and/or heard newspaper and radio advertisements from Little Six, Inc., for their "Job Fairs." These Job Fairs are designed to find large numbers of potential Casino employees from the general public. Upon information and belief, the Job Fairs have been held at the Bloomington Mariott, Radisson South and other locations off the Reservation;

14. That I am aware that during 1992, 1993 and 1994, Little Six, Inc., advertised on radio, television and in the newspaper for Casino patrons; and

15. That during the time I worked for Little Six, Inc., I had numerous contacts with the Little Six, Inc., Chairman of the Board, Leonard Prescott, at locations outside the boundaries of the Reservation.

Further your Affiant saith not.

Dated: December 5, 1994

/s/ Jill Gavle
Jill Gavle

Subscribed and sworn to before me
this 5th day of December, 1994.

/s/ Diane M. Brustad [SEAL]
Notary Public

EXHIBIT A

SECURITY

Applicant must be a law enforcement program student any age or P.O.S.T. Certified & have successfully compleled first aid training. Start at $7.00/hour plus good benefits. Full & part time evenings & weekends. For more information & an interview appointment call Personnel Dept at 496-3544.

Little Six, Inc.

1244 Canterbury Rd
Suite 306
Shakopee, MN 55379

BEST AVAILA

EXHIBIT B

BLACK JACK DEALER

Are you an eager, energetic individual with customer service experience and enjoy working with the public? Become part of one of the fastest growing businesses in Minnesota.

Little Six, Inc., is now accepting applications for part-time black jack dealers. Must be able to work evening, weekend and night hours. 2 week training at cost of $375.00. Come in for your application and interview:

Mon-Fri 3:00 P.M. to 7:00 P.M.

LITTLE SIX, INC.
CANTERBURY INN
1244 CANTERBURY ROAD SUITE 306
SHAKOPEE, N 55379

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BLACK JACK DEALERS

Mystic Lake Casino in Prior Lake is Minnesota's most spectacular new casino. We've created one of the country's most sophisticated gambling environments, and now we're looking for energetic and motivated people to be a part of our winning team.

Mystic Lake

CASINO

Applications are available 8 am-5 pm Mon. through Fri.
at the Human Resources Office, Canterbury Inn, #306
1244 Canterbury Road, Shakopee, MN 55379
($375.00 Training Fee)

496-3544

A DIVISION OF LITTLE SIX INC.